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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

BY NORMAN L. FREEMAN,
REPORTER.

VOLUME LXXVIII.

CONTAINING THE REMAINING CASES SUBMITTED AT THE JUNE TERM, 1875, AND A PORTION OF THE CASES SUBMITTED AT THE SEPTEMBER TERM, 1875.

PRINTED FOR THE REPORTER.

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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

JOHN M. SCOTT, CHIEF JUSTICE.

SIDNEY BREESE, PINKNEY H. WALKER,

WILLIAM K. McALLISTER, BENJAMIN R. SHELDON,

JOHN SCHOLFIELD, ALFRED M. CRAIG,

JUSTICES.

ATTORNEY GENERAL,

JAMES K. EDSALL, ESQ.

REPORTER,

NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,

R. A. D. WILBANKS, Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,

E. C. HAMBURGHER, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,

CAIRO D. TRIMBLE, Ottawa.

292721

TABLE OF CASES

REPORTED IN THIS VOLUME.

A

PAGE.

Adams *v.* Gardner..... 568
Albrecht *v.* The People..... 510
American Insurance Co. *v.* Padfield *et al.*..... 167
Anderson *ads.* Evans..... 558
Aurora, Common Council of, *et al. ads.* The People *ex rel.* Smith..... 218

B

Baker *ads.* Trepp..... 146
Balduc *ads.* Mix *et al.*..... 215
Balthasser *ads.* Miller..... 302
Beach *ads.* Downey, Admr. ... 53
Belden *v.* Perkins..... 449
Belleville Nail Mill Co. *v.* Chiles..... 14
Benedict *ads.* Sanborn *et al.*.... 309
Beresford *ads.* First National Bank of Chicago..... 391
Berger *et al. v.* Peterson..... 633
Berrington *v.* Casey..... 317
Berry *ads.* Paul..... 158
Beveridge *et al. ads.* Mulford *et al.*..... 455
Bliss *v.* Smith..... 359
Board of Education of District No. 3, etc. *v.* Neidenberger *et al.*..... 58

PAGE.

Board of Trustees of Township 13 S., R. 3 W. *v.* Misenheimer *et al*..... 22
Boland *ads.* Skelly..... 438
Borders *et al. v.* Murphy..... 81
Bowen *ads.* Zuel..... 234
Bowman *v.* Cunningham..... 48
Bradsby *ads.* Nichols..... 44
Bragg *v.* The People..... 328
Brickey *ads.* Keller... 133
Brownfield *v.* Wilson *et al.*..... 467
Browning *et al. ads.* Courson... 208
Brown *et al. ads.* Cuddy..... 415
——— *v.* Rounsavell..... 589
——— *et al. ads.* Schoenfeld... 487
Brush *v.* The City of Carbondale..... 74
Buchanan *v.* The International Bank..... 500
Buck *v.* The People *ex rel.* Swigert..... 560
Bulson *ads.* Thompson..... 277
Burleson *et al. ads.* Cummings *et al.*..... 281
Byars *v.* The City of Mt. Vernon. 11

C

Cairo and St. Louis R. R. Co. The People *ex rel. v.* The Trustees of Schools..... 136

PAGE.

Cairo and Vincennes R. R. Co. *v.* Fackney..... 116
Calder *ads.* Wenger..... 275
Carbondale, City of, *ads.* Brush. 74
Carpenter *et al. ads.* Mulvey... 580
Carondelet Iron Works *v.* Moore *et al.*..... 65
Casey *ads.* Berrington..... 317
Chaldeck *ads.* Monroe..... 429
Challenor *v.* Niles, Admr..... 78
Chicago, City of, *v.* McGiven.. 347
——— *ads.* Tugman..... 405
Chicago and Alton R. R. Co. *v.* Smith..... 96
Chicago and Pacific R. R. Co. *v.* Munger..... 300
Chicago, Rock Island and Pacific R. R. Co. *v.* Clayton.... 616
——— *v.* McKittrick..... 619
Chiles *ads.* The Belleville Nail Mill Co..... 14
Chiniquy, *v.* The People *ex rel.* Swigert..... 570
Choteau *et al. ads.* Winkleman. 107
Clabaugh *ads.* Primmer..... 94
Clark *ads.* Gotts..... 229
——— *et al. v.* The School Directors of District No. 1 etc. 474
Clayton *ads.* The Chicago, Rock Island and Pacific R. R. Co.. 616
Clement *v.* Newton *et al.*..... 427
——— *et al. v.* Powell *et al.*..... 20
Clingman *et al. v.* Hopkie..... 152
Cole *ads.* The City of Collinsville..... 114
Collinsville, City of, *v.* Cole... 114
Colvin *et al. ads.* Sheridan *et al.* 237
Cossitt *et al. ads.* Roby..... 638
Coursen *v.* Hixon..... 339
Courson *v.* Browning *et al.*..... 208
Covington *v.* The City of East St. Louis..... 548
Craft *v.* Dickens..... 131
Crate *ads.* Hardin..... 533
Cuddy *v.* Brown *et al.*..... 415
Culver *v.* The Hide and Leather Bank of Chicago..... 625

PAGE.

Cummings *et al. v.* Burleson *et al.*..... 281
Cunningham *ads.* Bowman.... 48

D

Dale *v.* Irwin..... 170
Dickens *ads.* Craft..... 131
Dickey *et al. v.* Reed *et al.*..... 261
Dobbins *et al. v.* Higgins *et al.*.. 440
Doran *v.* Mullen..... 342
Downey, Admr. *v.* Beach 53
Dunn, Admx. *ads.* The St. Louis, Vandalia and Terre Haute R. R. Co..... 197

E

East St. Louis, City of, *ads.* Covington..... 548
Elliott *et al. ads.* Peters *et al.*... 321
Empson *v.* The People..... 248
Evans *v.* Anderson..... 558
Excelsior Stone Co. *ads.* Nowak 307

F

Fackney *ads.* The Cairo and Vincennes R. R. Co..... 116
Ferguson *et al. ads.* Robinson.. 538
First National Bank of Chicago *v.* Beresford..... 391
First National Bank of Fairbury *ads.* Myers..... 257
Frankenthal & Bro. *ads.* Wheeler..... 124
Frye *et al. v.* Jones *et al.*..... 627
Furness *et al. v.* McGovern *et al.* 337

G

Gardner *ads.* Adams..... 568
——— *et al. v.* Russell..... 292
Gleason *v.* The Village of Jefferson *et al.*..... 399
Glencoe, Village, Council of, *v.* The People *ex rel.* Owen..... 382
Goldie *v.* McDonald *et al.*..... 605
Goodwin *ads.* Stockley, Admr. 127
Gotts *v.* Clark..... 229

PAGE.
Granger *et al. ads.* Webster *et al.* 230
Greene *ads.* Richards..... 525
Greenville, City of, *v.* Henry... 150
Gregory *v.* Martin, Admr..... 38
Griffin *ads.* Matzon *et al.*..... 477

H

Hadaway *v.* Kelly..... 286
Hadden *ads.* Tracey *et al.* Admrs 30
Hafner *ads.* Weintz..... 27
Hagebush *v.* Ragland..... 40
Haggard *et al. ads.* Patmor.... 607
Halley *ads.* Nixon..... 611
Halloway *ads.* Henry..... 356
Hamlin, Hale & Co. *v.* Race... 422
Ham *ads.* Simpson..... 203
Hardin *v.* Crate..... 533
Hawver *v.* Hawver..... 412
Heath *ads.* Wolcott *et al.*..... 433
Henry *ads.* The City of Greenville..... 150
——— *v.* Halloway..... 356
Hibernian Banking Association *ads.* Stewart..... 596
Hide and Leather Bank of Chicago *ads.* Culver..... 625
Higgins *et al. ads.* Dobbins *et al.* 440
Hinsdale *et al. ads.* Thomas.... 259
Hixon *ads.* Coursen..... 339
Holmes *v.* Shaver 578
Hopkie *ads.* Clingman *et al.*.... 152
Hopkins *v.* The Indianapolis and St. Louis R. R. Co..... 32
Horner *v.* Spelman *et al.*..... 206
Howell *et al. v.* Morlan..... 162
Huse *ads.* McCormick..... 363

I

Illinois Educational Association v. Strauder..... 35
Indianapolis and St. Louis R. R. Co. *ads.* Hopkins..... 32
——— *v.* Smith..... 112
International Bank *ads.* Buchanan..... 500
Irwin *ads.* Dale..... 170

J

PAGE.
Jefferson *et al.*, Village of, *ads.* Gleason..... 399
Johnson *et al. v.* Pace, Garnishee 143
———, The People *ex rel. ads.* Ross..... 375
Jones *et al. ads.* Frye *et al.*..... 627

K

Kankakee and Illinois River R. R. Co. *ads.* Todd, Trustee, etc. 530
Keller *v.* Brickey..... 133
Kelly *ads.* Hadaway..... 286
Kendall *ads.* Warne *et al.*..... 598
Kroer *v.* The People..... 294
Krome *ads.* Mallock..... 110

L

Lackey *ads.* The Ohio and Mississippi Ry. Co..... 55
Lee *ads.* McMillen..... 443
Lipman *v.* Lowitz..... 252
Lowitz *ads.* Lipman..... 252

M

Mallock *v.* Krome..... 110
Martin, Admr. *ads.* Gregory... 38
Matzon *et al. v.* Griffin..... 477
McAlpine *et al. ads.* Misch.... 507
McCormick *v.* Huse..... 363
McDonald *et al. ads.* Goldie... 605
McDowell *ads.* Wilson..... 514
McGiven *ads.* The City of Chicago..... 347
McGovern *et al. ads.* Furness *et al.*..... 337
McKittrick *ads.* The Chicago, Rock Island and Pacific R. R. Co..... 619
McMillen *v.* Lee..... 443
Mead *v.* Thompson..... 62
Metamora, town of, *ads.* Morley 394
Miller *v.* Balthasser..... 302
Misch *v.* McAlpine *et al.*..... 507

PAGE.
Misenheimer *et al. ads.* The Board of Trustees of Township 13 S., R. 3 W..... 22
Minzesheimer *ads.* Straus *et al.*.. 492
Mix *et al. v.* Balduc..... 215
Monroe *v.* Chaldeck..... 429
Moore *et al. ads.* The Carondelet Iron Works..... 65
Morgan *et al. v.* Stevens..... 287
Morlan *ads.* Howell *et al.*..... 162
Morley *v.* Town of Metamora.. 394
Morse *v.* Thorsell..... 600
Mt. Vernon, City of, *ads.* Byars 11
Mulford *et al. v.* Beveridge *et al.* 455
Mullen *ads.* Doran..... 342
Mulvey *v.* Carpenter *et al.*..... 580
Munger *ads.* The Chicago and Pacific R. R. Co..... 300
Murphy *ads.* Borders *et al.*..... 81
Myers *v.* First National Bank of Fairbury..... 257

N

Nassau Bank *ads.* Palmer..... 380
Neidenberger *et al. ads.* The Board of Education of District No. 3, etc..... 58
Newlin *et al. v.* Snyder *et al.*.. 528
Newman *v.* Willitts..... 397
Newton *et al. ads.* Clement..... 427
Nichols *v.* Bradsby..... 44
Niles, Admr. *ads.* Challenor... 78
Nixon *v.* Halley..... 611
Nowak *v.* Excelsior Stone Co.. 307

O

Ohio and Mississippi Ry. Co. *v.* Lackey..... 55
——— *v.* Stratton..... 88
Olney, City Collector of, *ads.* Spring *et al.*..... 101
Ovington *v.* Smith *et al.*..... 250
Owen, The People *ex rel. ads.* The Council of the Village of Glencoe..... 382
Owens *v.* Stevens..... 462

P

PAGE.
Padfield *et al. ads.* The American Insurance Co..... 167
——— *v.* Padfield *et al.*..... 16
Pace, Garnishee, *ads.* Johnson *et al.*..... 143
Palmer *v.* Nassau Bank..... 380
Partridge, Town of, *v.* Snyder.. 519
Paton *et al. v.* Stewart..... 481
Patmor *v.* Haggard *et al.*..... 607
Paul *v.* Berry..... 158
People *ads.* Albrecht..... 510
——— *ads.* Bragg..... 328
——— *ads.* Empson..... 248
——— *ads.* Kroer..... 294
———, use, etc. *ads.* Weir..... 192
——— *ads.* Wray..... 212
——— *ads.* Van Dusen..... 645
———, etc. for use of Schuchert *et al. v.* Phelps, Admx.. 147
——— *ex rel.* The Cairo and St. Louis R. R. Co. *v.* The Trustees of Schools..... 136
——— *ex rel.* Johnson *ads.* Ross. 375
——— *ex rel.* Owen *ads.* The Council of the Village of Glencoe..... 382
——— *ex rel.* Smith *v.* The Common Council of the City of Aurora *et al.*..... 218
——— *ex rel.* Swigert *ads.* Buck 560
——— *ads.* Chiniquy..... 570
Perkins *ads.* Belden 449
Peters *et al. v.* Elliott *et al.*..... 321
Peterson *ads.* Berger *et al.*..... 633
Phelps, Admx. *ads.* The People, etc., for use of Schuchert.... 147
Phillips *v.* Pitts & Co..... 72
Pitts & Co. *ads.* Phillips..... 72
Plummer *v.* Rigdon..... 222
Powell *et al v.* Clement *et al.*... 20
Primmer *v.* Clabaugh..... 94
Proudfoot *v.* Wightman..... 553

R

PAGE.

Race *ads.* Hamlin, Hale & Co.. 422
Ragland *ads.* Hagebush... ... 40
Ramsdell *ads.* Raybourn..... 622
Raybourn *v.* Ramsdell..... 622
Reed *et al. ads.* Dickey *et al*... 261
Richards *v.* Greene..... 525
Rigdon *ads.* Plummer..... 222
Rinks *v.* Shepard..... 188
Roberts *et al. v.* Stigleman *et al.* 120
Robinson *v.* Ferguson *et al*..... 538
——— *ads.* Tuttle *et al*..... 332
Roby *v.* Cossitt *et al*..... 638
Rock Island, City of, *v.* Vanlandschoot 485
Ross *v.* The People *ex rel.* Johnson 375
——— *v.* Ross..... 402
Rounsavell *ads.* Brown..... 589
Russell *ads.* Gardner *et al*..... 292

S

Sanborn *et al. v.* Benedict..... 309
Schoenfeld *v.* Brown *et al*..... 487
School Directors of District No. 1, etc. *ads.* Clark *et al*.... 474
School Trustees of, *ads.* The People *ex rel.* The Cairo and St. Louis R. R. Co..... 136
Schuchert *et al.* The People, for use, etc. *v.* Phelps, Admx.... 147
Shaver *ads.* Holmes..... 578
Shepard *v.* Rinks..... 188
Sheridan *et al. v.* Colvin *et al*... 237
Simpson *v.* Ham..... 203
Skelly *v.* Boland..... 438
Smith *ads.* Bliss..... 359
——— *ads.* The Chicago and Alton R. R. Co..... 96
——— *ads.* The Indianapolis and St. Louis R. R. Co..... 112
——— *et al. ads.* Ovington..... 250
———, The People *ex rel. v.* The Common Council of the City of Aurora *et al*..... 218
Snyder *et al. ads.* Newlin *et al*.. 528
——— *ads.* Town of Partridge. 519
Sornberger *ads.* Thompson.... 353
Spelman *et al. ads.* Horner..... 206
Spring *et al. v.* The Collector of the City of Olney..... 101
Stearns *et al. v.* Sweet *et al*..... 446
Stevens *ads.* Morgan *et al*..... 287
——— *ads.* Owen..... 462
Stewart *v.* The Hibernian Banking Association. 596
——— *ads.* Paton *et al*..... 481
Stigleman *et al. ads.* Roberts *et al*..... 120
St. Louis, Vandalia and Terre Haute R. R. Co. *v.* Dunn, Admx 197
Stockley, Admr. *v.* Goodwin... 127
Stratton *ads.* The Ohio and Mississippi Ry. Co..... 88
Strauder *ads.* The Illinois Educational Association..... 35
Straus *et al. v.* Minzesheimer.. 492
Sweet *et al. ads.* Stearns *et al*... 446
Swigert, The People *ex rel. ads.* Buck..... 560
——— *ads.* Chiniquy..... 570

T

Tracey *et al.* Admrs. *v.* Hadden 30
Thomas *v.* Hinsdale *et al*..... 259
Thompson *v.* Bulson..... 277
——— *ads.* Mead..... 62
——— *v.* Sornberger..... 353
Thorsell *ads.* Morse..... 600
Todd, Trustee, etc. *v.* The Kankakee and Illinois River R. R. Co..... 530
Trepp *v.* Baker..... 146
Tugman *v.* The City of Chicago. 405
Tuttle *et al. v.* Robinson..... 332

V

Van Dusen *v.* The People..... 645
Vanlandschoot *ads.* The City of Rock Island..... 485

W

PAGE.

Warne *et al. v.* Kendall..... 598
Webster *et al. v.* Granger *et al.*. 230
Weintz *v.* Hafner..... 27
Weir *v.* The People, use, etc... 192
Wenger *v.* Calder 275
Wheeler *v.* Frankenthal & Bro. 124
Wightman *ads.* Proudfoot..... 553
Willitts *ads.* Newman..... 397
Wilson *et al. ads.* Brownfield.. 467
——— *v.* McDowell..... 514
Winkleman *v.* Choteau *et al.*... 107
Wolcott *et al. v.* Heath..... 433
Wray *v.* The People..... 212

Z

Zuel *v.* Bowen..... 234

CASES

IN THE

SUPREME COURT OF ILLINOIS.

SOUTHERN GRAND DIVISION.

JUNE TERM, 1875.

WILLIAM BYARS

v.

THE CITY OF MT. VERNON.

COMPLAINT — *sufficiency of, for violation of ordinance.* In a prosecution under an ordinance for selling intoxicating liquors, a complaint, under oath, that the defendant, as the prosecutor is informed and believes, has committed an offense, by violating the provisions of a certain section of an ordinance, which is given, by selling intoxicating liquors in the city, not having a legal license to keep a grocery, is substantially good.

APPEAL from the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

This was a prosecution, by the city of Mt. Vernon, against William Byars, for the selling of intoxicating liquors in said city, without a license to keep a grocery, in violation of an ordinance of the city.

The following is a copy of the complaint upon which the suit was brought:

"Samuel D. Cooper, city marshal, comes, and, on his oath, complains against William Byars, and says that he, the said William Byars, as he is informed and believes, in the city of Mt. Vernon, on the 2d day of March, 1874, did commit an offense, to-wit: violate the provisions of section 1 of ordinance 37, by selling intoxicating liquors, not having a legal license to keep a grocery; wherefore, the complainant prays that a warrant may issue."

A warrant was issued upon said complaint, under which the defendant was arrested. The defendant moved the police magistrate to quash the complaint and warrant; the motion was overruled, and a trial had, resulting in a judgment against the defendant for $200, from which he appealed to the circuit court.

In the circuit court, the defendant again moved to quash the complaint and the writ issued on the same, for the following reasons:

1. Because the complaint is based upon information and belief.

2. The complaint does not show but that the defendant had a license to keep a grocery.

3. The amount claimed is not indorsed upon the summons.

The court overruled the motion, to which the defendant excepted. On the trial of the appeal, the plaintiff gave in evidence ordinance No. 37, section 1 reading as follows:

"1. *Be it ordained by the City Council,* That it shall be unlawful for any person or persons, within the city limits, by agent or otherwise, without first having obtained a license to keep a grocery, to sell, in any quantity, or give away, any intoxicating, malt, vinous, mixed or fermented liquors."

By section 5, the giving away of intoxicating liquors, or other shift or device to evade the provisions of the ordinance, was to be deemed and held to be an unlawful selling, within the provisions of the ordinance.

By section 8, it was provided that any person violating any

provision of the first section of the ordinance, should forfeit and pay to the city not less than $20 nor more than $100, or be imprisoned in the city prison not less than 20 nor more than 30 days.

The jury found the defendant guilty of six violations, and fixed the penalty for each at $20. The defendant moved for a new trial, which the court denied, and rendered judgment in favor of the city for $120 and costs, from which the defendant appealed.

Messrs. POLLOCK & KELLER, and Mr. E. V. SATTERFIELD, for the appellant.

Mr. T. T. WILSON, and Mr. J. M. HAMILL, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This prosecution was commenced before a police magistrate of the city of Mt. Vernon, under the first section of an ordinance which makes it unlawful for any person not having a legal license, within the limits of the city, to sell, in any quantity, or give away, any intoxicating, malt, vinous, mixed or fermented liquors.

The objections taken to the validity of the proceedings are, in substance, the same as those taken in a former case between these same parties, submitted at the present term, and are disposed of by the opinion in that case, to which reference is made for an expression of our views. 77 Ill. 467.

In this case, however, a motion was made before the magistrate to quash the complaint and writ; but we are of opinion, as was said in the former case, the complaint is substantially good, and, as the writ follows the complaint, there was no error in overruling the motion.

We have examined the instructions, and find no tenable objections to any of them, unless it is the second and third

of the series given on behalf of the prosecution, but they have so little connection with the case, it is hardly possible they could have misled the jury to the injury of appellant. Considered together, the instructions given for plaintiff and defendant state the law of the case very fairly, and even favorably for defendant.

On the evidence, there can be no doubt defendant sold intoxicating liquors contrary to the provisions of the ordinance. It is not claimed he had any license to sell, and whether he was a druggist, and sold in good faith for medical purposes, was one of the questions submitted to the jury, under instructions from the court quite favorable to the cause of defendant.

A fair and impartial trial has been accorded defendant, under the forms of the law. On full consideration of the whole record, we think the conviction is justified by the evidence, and the judgment must be affirmed.

Judgment affirmed.

THE BELLEVILLE NAIL MILL COMPANY

v.

TARLTON W. CHILES.

PRACTICE—*trial with demurrer undecided.* Where parties go to trial by consent, with a demurrer to a count of the declaration undecided, it will be no cause for the reversal of the judgment.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. C. W. & E. L. THOMAS, for the appellant.

Mr. JAMES M. DILL, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, in the St. Clair circuit court, brought by Tarlton W. Chiles against the Belleville Nail Mill Company, resulting in a verdict and judgment for the plaintiff. The defendant appeals, and assigns various errors, some of which, deemed of sufficient importance, will be noticed.

The case has been twice tried by jury. On the first trial, the verdict and judgment were for the defendant. On writ of error to this court by the plaintiff, the judgment was reversed, this court holding, there was an employment of the plaintiff by the defendant company, as a bookkeeper, for one year. This was the principal point in controversy in the case.

On the second trial, the same point was litigated before the jury, and on due consideration, they found for the plaintiff, and assessed his damages at seventeen hundred and seventy-five dollars, being the estimated value of his services for one year.

The testimony on this point does not differ materially from that contained in the previous record, and we can come to no other conclusion than the one before reached, that plaintiff was employed by the year, and the amount found is no more than adequate compensation for that time. We are of opinion the verdict is fully sustained by the evidence.

No objection is perceived to the instructions, the court having given all that were asked on either side, modifying those of the defendant, in unimportant particulars. No point is made upon them.

Some minor objections are made by appellant—one is, that it appears the action was commenced before the cause of action arose. This is set at rest by the supplemental record filed by appellee, that the action was commenced on the 17th of February, 1871, the date of the summons, and that was the commencement of the suit.

Another point made by appellant is, that a trial was had

on the issues of fact, a demurrer being at the time pending and undisposed of, to one count of the declaration.

The parties went to trial by consent, as the record shows, and the demurrer, being undecided, is no cause for the reversal of a judgment. *Parker* v. *Palmer*, 22 Ill. 489; *Davis* v. *Ransom*, 26 ib. 100.

These are all the points worthy of special notice, and affect, in no degree, the validity of the judgment, and it must be affirmed.

Judgment affirmed.

CATHARINE PADFIELD

v.

WILLIAM R. PADFIELD *et al.*

1. WIDOW—*has no right to share in personal property disposed of by her husband in his lifetime.* Any disposition of personal property and credits by a husband, in good faith, where no right or interest is reserved to him, either present or ultimate, though made to defeat the rights of his wife, will be good against her.

2. Where a husband transferred to one of his sons notes and evidences of indebtedness to the amount of $60,000, under an agreement that he was to have one-third, and at the donor's death the son should deliver the balance to certain trustees for the donor's other two children, in consideration of which the son was to pay his father $2000 annually, while he lived, for support: *Held*, that the transfer was based upon a sufficient consideration, and placed the property beyond the father's reach, and that his widow could not claim any dower in the same.

3. If the husband had retained the right to control the property and resume the same at pleasure, the gift would have been in fraud of the rights of his wife, and, on his death, she could have recovered her share in the same, as given by the statute.

4. There is nothing in the statute respecting estates of deceased persons, that in the slightest degree prevents a husband from disposing of his personal property free from any claim of his wife, whether by sale, gift to his children, or otherwise, in his lifetime.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. C. W. & E. L. THOMAS, for the plaintiff in error.

Mr. JAMES M. DILL, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill in chancery, filed by plaintiff in error, in the St. Clair circuit court, against defendants in error. The bill alleges that Thomas Padfield, the late husband of plaintiff in error, in his lifetime, and for the purpose of evading the statute, and to deprive her, at his death, of any share in his personal estate, transferred to his son William a large amount of notes and evidences of indebtedness, amounting to about $60,000, under the agreement that he was to have one-third, and, at the father's death, two-thirds of the amount was to be delivered to Ensenmayer and Whitaker, for the use of James M. Padfield and Julia A. Bland, both his children, to be disposed of as directed by the will of Thomas Padfield; and William was, by the agreement, to pay to his father $2000 annually, while he lived, for his support; that Thomas Padfield made his will, by which he bequeathed to each of his children $5, and the remainder of his property, of every nature, kind and description, to plaintiff in error; that she, in the time limited by the statute, renounced all benefits and rights under the will; that he, by his will, gave all of the notes, etc., transferred to William, or the proceeds thereof, whether money or land, to complainant. The will was duly probated, and remains in full force.

This contract was held to be valid and binding in the cases of *Padfield* v. *Padfield*, 68 Ill. 210, and *Padfield* v. *Padfield*, June T. 1874; that it was based on a sufficient consideration, and passed the title of the property and placed it beyond the reach of Thomas Padfield; that he did not reserve any interest in or control over the notes, etc., and that all title had

passed from him; that the law fully supported the transaction, and that neither Thomas Padfield nor his executor could invalidate the agreement or recover the property.

But it is urged that this transaction was void as to plaintiff in error; that, under our statute, a husband has no power to dispose of his personal property so as to deprive his wife of her distributive share therein, and that the demurrer admits the allegation that this transfer was made for the purpose of evading the statute, and preventing her from sharing in his personal property. The doctrine is correctly stated in Kerr on Fraud and Mistake, 220, in a note. It is there said: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life, independently of the concurrence, and exonerated from the claim of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition of the husband be *bona fide*, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her." And the cases of *Dunnock* v. *Dunnock*, 3 Md. Ch. 140, *Cameron* v. *Cameron*, 10 Smedes & Mar. 394, *Lightfoot* v. *Colgin*, 5 Munfd. 42, *Stewart* v. *Stewart*, 5 Conn. 317, *Holms* v. *Holms*, 3 Paige, 363, are referred to, and fully support the doctrine.

Here, there was a final disposition of the property. It was irrevocably distributed among his children as an advancement, and he reserved no interest, present or ultimate, in the property; and the common law has always recognized the right of a father to advance his children when and as he might choose, without limit as to time or amount, and natural love and affection have always been held a sufficient consideration to support such gifts, when executed. And this followed from the undoubted right that all men possessed—the power of selling or disposing of their property as they choose.

It is true that, where a husband still retained the right to control the property, and resume the same at pleasure, such a

gift was held to be in fraud of the rights of his wife. But there, the transfer was only colorable, the title still being in the husband, and, being thus entitled, the wife could claim and recover her share, on the death of the husband. In such a case, the husband still remained the owner, notwithstanding the apparent sale, and hence the wife was entitled to share in such property as in any other. The statute gives her a right to one-third of the personal estate owned by her husband at the time of his death, after the payment of his debts, in case he dies intestate. Hence, when the sale is only colorable, and the property may be resumed by the husband, and he thus dies the owner, the wife may participate in its distribution.

The 49th section of the Statute of Wills provides for the distribution of intestate estates amongst his children, or their children, etc., and saves to the widow her dower, as provided by law. The 50th section defines the word to include one-third of the intestate personal estate of her deceased husband forever, after the payment of debts. The 52d section gives to the widow, in all cases, as against creditors, certain specific articles of personal property; and the 53d section gives to widows of persons dying intestate, one-third of the personal estate of their husbands, after payment of debts, as their property forever. There is nothing found in these provisions which, in the slightest degree, prevents the husband from disposing of his personal property free from any claim of the wife, whether by sale, gift to his children, or otherwise, in his lifetime.

Again, the act of 1861, known as the "Married Woman's Law," confers upon *femes covert* the power of disposing of their separate property, absolutely and as they may choose, free from the control of their husbands. It was manifestly the intention of the General Assembly to confer on married women the same and no greater rights, in regard to their property, as were possessed by their husbands. It would be singular, and we can not suppose that the legislature could

have intended to confer other or greater power on the wife than upon the husband. To hold that a *feme covert* has a vested interest in her husband's personal estate, that he is unable to divest in his lifetime, would be disastrous in the extreme to trade and commerce. Owing to commercial necessities, personalty must be left free for exchange, and, to be so, some one must be vested with full power to sell and transfer it free from latent and contingent claims.

We are unable to see any legal grounds upon which to base the claim of plaintiff in error, and the court below did right in sustaining the demurrer and dismissing the bill, and the decree is affirmed.

Decree affirmed.

JOAB POWELL *et al.*

v.

CONVERSE CLEMENT *et al.*

1. DEFAULT—*setting aside, a matter of discretion.* The setting aside of a default in a chancery suit is a matter of discretion, the exercise of which by the court can not be inquired into by this court on appeal or writ of error.

2. Where the return of service was regular, in a suit to foreclose a mortgage, and one of the defendants, after default, decree of foreclosure, sale and confirmation thereof, appeared and asked to have the default set aside, and he be allowed to answer, on his affidavit showing a variance between the original summons and the copy delivered by the officer: *Held*: that the motion to set aside the default was properly refused.

WRIT OF ERROR to the Circuit Court of Hamilton county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. SETH F. CREWS, for the plaintiffs in error.

Messrs. TOWNSHEND, ECKLEY & TOWNSHEND, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a motion made by Joab Powell, in the circuit court of Hamilton county, at the February term, 1875, in the cause of Converse Clement and John H. Morgan against Joab Powell and Harriet C. Powell, his wife, to set aside a master's sale, which had been had under a decree of foreclosure of a mortgage, which had been entered in the cause at a previous term, against the defendants, by default, and to vacate the decree and set aside the default, and for leave to allow the said Joab Powell to answer the bill. The court below overruled the motion, and the defendants in that suit bring the record here by writ of error, and assign as error the overruling of said motion.

The decree of foreclosure by default, and for sale of the mortgaged premises, was rendered at the February term, 1874; the master's report of their sale under the decree was made and confirmed at the September term, 1874.

The motion was supported by the affidavit of Powell, that the purported copy of the summons with which he was served was not a true copy of the summons in the case, and that he had a meritorious defense. The particulars in which the copy of the summons with which Powell was served, varied from the summons in the case, were, that, in the copy, there was the absence of a seal, the name of Converse Clement, one of the complainants, was written *Cornelius* Clement, and the date of the issue of the writ by the clerk was February 23, 1874, instead of February 3, 1874, as in the summons, and February 23, 1874, being the return day in the body of the summons.

The summons contained in the record is under the seal of the court, and regular in every respect. It bears upon it the indorsement of the sheriff's return of service, that he served the summons by reading it and delivering a copy of it to each of the defendants, Joab Powell and Harriet C. Powell, February 12, 1874. The return of service appears to be regular and sufficient in every respect

In *Garner et al.* v. *Crenshaw*, 1 Scam. 143, it was held by this court, that setting aside a default was an exercise of the discretionary power of the court, which could not be inquired into on appeal or writ of error. See, also, *Wallace* v. *Jerome*, 1 Scam. 524; *Woodruff* v. *Tyler*, 5 Gilm. 457; *Cox* v. *Brackett*, 41 Ill. 222. We are satisfied, too, that this power was discreetly exercised in the present case.

The decree will be affirmed.

Decree affirmed.

THE BOARD OF TRUSTEES OF TOWNSHIP 13 S, R. 3 W.

v.

JOSHUA L. MISENHEIMER *et al.*

1. EVIDENCE — *as to handwriting.* A witness may have sufficient knowledge of a handwriting to give his opinion as to a disputed signature, although he may never have seen the party write. There are two modes by which a knowledge of the handwriting of another may be acquired, *first*, by having seen the party write, and *secondly*, from having seen letters, bills and other documents purporting to be the handwriting of the party, and having afterwards *personally* communicated with him respecting them, or *acted upon them* as his, the party having known and acquiesced in such acts, founded upon their genuineness, or by such adoption of them into ordinary business transactions of life as induces a reasonable presumption of their being his own writings.

2. But where the witness has no acquaintance with the handwriting of the party until after a particular signature is denied, and he then examines his report as guardian, filed in the county court, and the signature thereto, he will not be competent to give an opinion as to the genuineness of the signature in dispute, his knowledge being derived under circumstances calculated to bias his mind.

3. SCHOOL TREASURER'S BOND—*liability for releasing debt secured by mortgage.* If a school treasurer releases a mortgage given to secure a debt due the school fund of his township, without an order of the board of trustees, or a majority of them, entered upon their journal, and subscribed by their president and clerk, he will be liable upon his official bond for any loss sustained in consequence thereof.

4. INSTRUCTIONS—*must be based upon evidence.* It is error to give an instruction upon a given state of facts susceptible of definite proof, where there is no evidence tending to prove the same.

APPEAL from the Circuit Court of Union county; the Hon. M. C. CRAWFORD, Judge, presiding.

Messrs. MULKEY & ANDREWS, and Mr. GEO. W. WALL, for the appellants.

Mr. R. R. TOWNES, and Mr. W. S. DAY, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This is an action of debt, brought by appellants, against appellees, on the official bond of Misenheimer, as township treasurer of township 13 south, range 3 west, in Union county. Appellees pleaded jointly, traversing the several breaches of the bond assigned in the declaration, and appellee Leyerle also pleaded *non est factum*, verified by affidavit. Issues were joined on all the pleas, and the jury rendered a verdict, upon which the court gave judgment, for appellees.

The first question presented is, was the evidence of Hugh Andrews, in relation to the genuineness of the signature purporting to be Leyerle's, to the bond, properly excluded from the jury?

It is true, as contended by counsel for appellants, a witness may have sufficient knowledge of a handwriting to give his opinion of a disputed signature, although he may never have seen the party write. It is said in 1 Greenleaf's Evidence, sec. 577, after stating that there are two modes by which knowledge of the handwriting of another may be acquired, and giving the first, namely, by having seen the party write, "the second mode is, from having seen letters, bills or other documents purporting to be the handwriting of the party, and having afterwards *personally* communicated with him respecting them, or *acted upon them* as his, the party

having known and acquiesced in such acts, founded upon their supposed genuineness, or by such adoption of them into *ordinary* business transactions of life as induces a reasonable presumption of their being his own writings, evidence of the identity of the party being, of course, added *aliunde*, if the witness be not personally acquainted with him. In both these cases, the witness acquires his knowledge by his own observation of facts occurring under his own eye, and, which is especially to be remarked, without having regard to any particular person, case or document."

But Andrews does not profess to have had any acquaintance with Leyerle's handwriting until since he was informed he denied the signature to the bond, when, as he says, to satisfy himself, he went to the county clerk's office and examined his signature to his reports as guardian, and, from a comparison of those, he formed an opinion that the signature to the bond is that of Leyerle. This is clearly insufficient to entitle him to give his opinion in evidence. His knowledge was acquired under circumstances tending to bias his mind, imperceptibly though it may have been to himself. It is scarcely probable that he did not have some impression as to the genuineness of the signature before he examined the guardian's reports. That he felt an interest in the question, is shown by the fact that he put himself to the trouble to make the examination. When, therefore, he investigated, however honest he may have believed himself to be, the natural tendency of his mind would most likely find something to confirm his preconceived opinion. In this way, important differences may have been overlooked, and slight resemblances greatly magnified. Knowledge thus acquired is vastly different from that acquired by repeatedly seeing a handwriting, and scrutinizing it, when no unfavorable circumstances exist to arouse suspicion and excite the imagination.

The evidence was properly rejected.

The next question is, were the following instructions, numbered one and six, in the series given at the instance of appellees, properly given:

"1. The court instructs the jury that township treasurers, under the laws of this State, are public officers, appointed by the board of trustees in their respective townships; that such treasurers, after they are so appointed and qualified, are the legal custodians of all books, papers, notes, due-bills, mortgages, moneys and all other evidences of indebtedness to the township of which they are treasurers. subject to the control of the board of township trustees; that such treasurers are required by law to make full and complete reports and exhibits of all books, papers, notes, due-bills, mortgages and other evidences of indebtedness, to said board of township trustees, for their inspection, at least twice in each year, and oftener if required so to do by said board; that he is at all times subject to removal by said board, for any failure on his part to perform any of the duties required of him by law or by the by-laws, resolutions, orders or instructions of said board; that while he is the custodian of such funds and securities, the township trustees are the guardians of the same, and at all times have the legal authority to control and manage the same, and if the treasurer, while acting under the orders or requisitions of the township trustees entered upon the records, and signed by their president and clerk, makes misapplication or misuse of such funds, they become personally liable therefor, and, under such circumstances, the treasurer would not be liable."

"6. The court instructs the jury that, for any failure or refusal of a school treasurer to perform any or all the duties required of him by law, he shall be liable to the board of trustees upon his bond, to be recovered by action of debt by said board in their corporate name, for the use of the proper township; but if said treasurer, in any such failure or refusal, acted under or in accordance with the requisition or

order of said board, or a majority of them, and by reason of said requisition, order or approval, such township suffers loss, defalcation or misapplication of township school funds, such order, requisition or direction being entered of record on the journal of such board, signed by the president and clerk thereof, then, and in that case, the members of said board aforesaid, or those of them voting for said order, requisition or direction aforesaid, and not the treasurer, shall be liable, jointly and severally, to the inhabitants of such township, to be recovered by a proper action against them; and if the jury believe, from the evidence, that the said Joshua L. Misenheimer was acting in accordance with the direction or requisition of the board of township trustees of township No. 13 south, range 3 west, entered upon their record and signed by their president and clerk, in the release of certain real estate mortgages, and in the use of township funds, and by reason thereof the alleged loss occurred, your verdict should be for the defendants."

The only evidence in the record which appellees claim will justify these instructions, is that of Misenheimer. It is this: "The mortgage executed by William G. Campbell and wife was released by me without any authority from the trustees of said township at the time, and the amount afterwards accounted for to the trustees in this way: that I myself became responsible for said amount, which report or statement to said trustees was approved by them, but whether anything was entered of record in reference to this approval, I am not now able to state. There was also about $186.60 deficiency on interest upon this $1000 at the time of the execution of the third bond."

In no other part of his testimony does he state, nor does any other witness swear, that, in regard to the Campbell note and mortgage, and the interest due thereon, he acted under and in conformity to a requisition or order of the board of trustees, or a majority of them, *entered upon their journal and*

subscribed by their president and clerk; and unless this was done, the liability of the trustees did not attach, and Misenheimer and his sureties were not released. Gross' Statutes 1869, p. 703, sec. 64.

It was incumbent on appellees to prove that this requisition or order of the board was entered upon the journal, and subscribed, as the statute requires. The evidence did not tend to prove it. The witness simply had no recollection one way or the other. The matter was susceptible of definite proof, and, until the proof was produced, it was error to instruct the jury upon the assumption there was proof before them which might be held sufficient.

Since we are unable to say upon which plea the verdict of the jury may have been found, it follows, for the error in giving these instructions, the judgment must be reversed and the cause remanded.

Judgment reversed.

JACOB WEINTZ

v.

PETER HAFNER.

1. CONTRACT—*right to rescind for omission of other party.* A slight or partial neglect, on the part of one of the contracting parties, to observe some of the terms or conditions of the contract, will not justify the other party at once to abandon or rescind the same.

2. In order to justify an abandonment of a contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default.

3. For partial dereliction and non-compliance in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself.

4. Thus, where a party sold a farm, and agreed to build a barn on the premises, and deliver possession by a given day, it was *held*, that a failure

to have the barn completed at the time the second payment fell due, and before the time of delivery of possession, did not justify the purchaser in refusing payment, and authorize him to recover back the sum paid at the making of the contract. Neither would a refusal to give a receipt for the second payment justify a rescission by the purchaser, even if one were required by the contract.

APPEAL from the Circuit Court of White county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Messrs. CREBS & CONGER, for the appellant.

Messrs. POLLOCK & KELLER, and Messrs. MCDOWELL & MCCLINTOCK, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action, brought by Peter Hafner against Jacob Weintz, to recover $50, which had been paid as a part of the purchase price of a certain tract of land which Hafner had purchased of Weintz.

A trial of the cause was had before a jury, which resulted in a verdict for the plaintiff. The defendant, Weintz, brings the record here by appeal.

It appears, from the evidence contained in the record, that, on the 4th day of June, 1872, appellant, by contract, in writing, sold appellee a farm of 97 acres of land, for $3000; $50 was paid down, $450 was to be paid on the 1st day of October, 1872, $500 on the 1st of March, 1873, $1000 on the 1st day of March, 1874, and $1000 on the 1st day of March, 1875, with interest, at the rate of ten per cent, from the 1st day of March, 1873.

Appellee was to have possession of the farm on the 1st day of March, 1873. The contract also contained a provision, that appellant should build a barn on the land, and have it completed at the time possession of the farm was to be given.

When the $450 payment became due, on the first of October, the barn had been erected, but the floor had not been laid and certain folding doors had not been hung, which detracted

$25 from the value of the barn. Appellant, however, offered to have the barn completed, as was understood by the parties, by the time possession of the farm was to be given.

This did not seem to suit appellee. He declined to pay the October payment, demanded the $50 he had paid upon the contract, and upon appellant's refusal to repay the money, he instituted this suit to recover it.

Appellee had no right to rescind the contract and recover the purchase money paid, unless appellant had failed, in a substantial manner, to observe his part of the contract. A slight or partial neglect on the part of one of the parties to a contract to observe some of the terms or conditions thereof, will not justify the other party to at once abandon the agreement.

As was said in *Selby* v. *Hutchinson*, 4 Gilm. 319, in order to justify an abandonment of the contract, and of the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default.

For partial derelictions and non-compliances in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must still seek his remedy upon the stipulations of the contract itself. See also *Doggett* v. *Brown*, 28 Ill. 493, and *McPherson* v. *Walker*, 40 Ill. 371.

Taking the rule here announced as a guide, we fail to perceive wherein appellant was in default.

Appellee was not entitled to the possession of the farm until the 1st day of March, 1873. By the very terms of the contract which required appellant to build the barn, he was not bound to have it finished until he delivered the possession of the farm.

If, then, in October, 1872, $25 worth of labor was yet to be expended on the barn, this could be no ground of rescission on the part of appellee, for the reason that appellant had five

months in which to complete the barn and deliver the possession of the farm, as provided in the contract.

It is, however, urged, that appellant refused to give a receipt to appellee for the payment due October 1, 1872; and that is urged as a further reason to sustain the right of appellee to rescind the contract.

The contract, however, nowhere requires appellant to execute receipts for money received upon it; but even if it did, a failure to observe such a requirement would be no ground for rescission.

A receipt would only be evidence that a payment had been made. If appellee was apprehensive that appellant would fail to give him credit for the payment, he could call a witness to the transaction, which would answer all purposes, and would be quite as satisfactory as a formal receipt.

The grounds relied upon by appellee to authorize him to rescind, are entirely too trivial in their character to justify him to abandon the contract.

The judgment will therefore be reversed.

Judgment reversed.

DWYER TRACEY *et al.* Admrs.

v.

MARY HADDEN.

REMEDY—*by heir for moneys due from administrator after his death.* Where an administrator dies, without having paid an heir his distributive share, which had come to the hands of the administrator, the heir may proceed upon his official bond, or elect to present the sum due as a claim against his estate.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

This was a claim presented by Mary Hadden against the estate of Benjamin Hudson, deceased. The claim was allowed in the county court, from which judgment the administrators, Dwyer Tracey and John Phillips, appealed to the circuit court. On the trial of the appeal, the claimant recovered judgment for $795.67, and costs of suit, to reverse which the administrators bring the record to this court by appeal.

Messrs. BRYAN, KAGY & SMITH, for the appellants.

Messrs. GOODNOW & MERRITT, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

Appellee is one of the heirs of Melinda Hudson, deceased, of whose estate Benjamin Hudson, in his lifetime, was the administrator. As such administrator, the distributive share of the estate of Melinda Hudson, which belonged to appellee, came to his hands, which he retained. After his death, appellee presented her claim against his estate, which was allowed by the court. This she had the clear right to do. She could elect to present her claim against the estate, or proceed on the official bond of the deceased administrator, at her option. She chose to do the former, and we are at a loss to understand what objection can be urged against the proceeding. The statute contemplates such a course, and it is provided claims of this character shall constitute the sixth class, and be paid accordingly.

The evidence sustains the finding as to the amount due the claimant; and perceiving no error in the record, the judgment of the circuit court will be affirmed.

Judgment affirmed.

NATHAN F. HOPKINS

v.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD CO.

1. EVIDENCE—*opinions of witnesses.* In an action against a railway company to recover for personal injury received by the plaintiff while coupling cars, upon the question whether the plaintiff used due care, or acted imprudently, it is error to admit in evidence the opinions of witnesses engaged in the same business, as no question of science, skill or trade is involved. The facts only should be proved in such a case, and leave the jury to determine whether due care was used, uninfluenced by the opinions of others.

2. PRACTICE IN SUPREME COURT—*not always reverse for error.* Where the whole record is open for inspection, this court will look to see where the right and justice of the case are, and although the court below may have erred in the admission of improper evidence, and in some of its instructions, yet if, by eliminating the improper testimony and instructions based on it, the plaintiff has made no case, a judgment against him will not be reversed.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. DALE & BURNETT, and Mr. LEVERETT BELL, for the appellant.

Mr. B. W. HANNA, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action on the case, brought to recover damages of the defendant, for an injury occasioned in coupling cars, on the allegation that defendant had failed to provide the cars with proper links, bumpers, draw-heads and other necessary machinery and fixtures, so that the duty of coupling the cars might be safely performed; and on the further allegation, of permitting cars to be improperly loaded, whereby the danger of coupling was greatly increased. There was a further allegation, that the deficiency in the necessary apparatus

for safe coupling of the cars might have been known to the defendant by the exercise of proper diligence.

There was a plea of not guilty, and trial by jury, who found a verdict for the defendant. A motion for a new trial was denied, and judgment rendered against the plaintiff for the costs, and the plaintiff appeals.

The errors assigned question the instructions of the court given on behalf of the defendant, and the finding of the jury, as being against the evidence, and the admission of certain testimony on the part of the defendant.

The first point is made on this assignment of errors. It is insisted the testimony of Pease and of five others, called as experts, should not have been admitted. These witnesses were permitted, against the objections of plaintiff, to give to the jury their opinion as to the propriety of plaintiff's act in coupling the cars, and permitting them to state what they would have done under like circumstances. It was sought by these witnesses to show that plaintiff's act in coupling the cars was the act of an imprudent and careless man.

We are satisfied the matter about which these witnesses were examined, was not a question proper for the testimony of experts, as it was not one of science, skill or trade, to which the dogmatical statements of experts are allowed to go to the jury, on the presumption their pursuits qualify them to speak authoritatively. Here is no such question. It was one of care, simply, about which the jury would be as competent to give an opinion on the facts disclosed, as the most accomplished expert. The question was, did plaintiff use due care in attempting to couple the cars, and on which the jury should not be influenced by the opinion of others engaged in the same employment, or who may suppose they have the knowledge of the proper manner in which such an act should be done. That there was error in admitting this testimony, we have no doubt, and the instructions based upon this testimony were also erroneous, and should not have been given.

The next point made by appellant is, on the first instruction given on behalf of defendant. He contends it is faulty, as being too broad, inasmuch as it is the doctrine of this court, that a plaintiff may recover if negligent on his part, if that negligence was slight when compared with that of defendant, which must be gross.

It is unnecessary to go into an extended argument upon the instructions, as, by the exceptions and the errors assigned, the whole record is open to the inspection of the court, enabling us to see where the justice of the case is. It is elementary, a plaintiff must prove his case substantially as he has alleged it. We look in vain for any proof of defendant's negligence in any respect. It is not shown there were any defects in the machinery used for the safe coupling of cars, or that the car was improperly loaded, but it is in evidence that the plaintiff, of his own motion, knowing well the condition of the loaded car, and of the danger attending an attempt to couple it to the coal car, chose the most dangerous and inexpedient mode to effect the object, he himself saying "he ought to have had more sense than to have gone in there."

Eliminating from the record the testimony adjudged to have been improperly admitted, and the instructions based on it, an examination of what remains of the record satisfies us the plaintiff wholly failed in making out a case against the defendant. Neither of the counts is supported by any evidence, and, in such a case, the doctrine of contributive negligence can have no place. There is nothing of that element to be considered.

The plaintiff, by his own carelessness and stupidity, brought the misfortune upon himself, and he alone must bear the consequences. He has made out no case, and, notwithstanding the error of the court, the judgment must be affirmed.

Judgment affirmed.

THE ILLINOIS EDUCATIONAL ASSOCIATION

v.

PETER STRAUDER.

MEASURE OF DAMAGES—*for work and labor, as affected by subsequent agreement.* Where a person employed to lay the brick in a building at a specified price per thousand, according to measurement, is stopped by the employer before completion, and it is afterwards agreed that he shall proceed with the work, and be paid a reasonable compensation without regard to the price fixed by the original contract, and he to waive all claim for damages, the question whether the openings in the walls shall be included in the measurement becomes immaterial, as the contractor will be entitled to recover what his work is reasonably worth.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. MARSHALL W. WEIR, for the appellant.

Messrs. HAY & KNISPEL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This suit was brought by appellee, to recover for laying the brick in the third story of a building called the "Howe Literary Institute." It appears that on the 9th day of October, 1873, the parties entered into an agreement, by which appellee was to lay the brick and set the stone in the entire building, for which appellants were to pay him $3.75 per thousand brick laid, according to measurement. Appellants were to furnish material; and in case of disagreement the parties were to submit the measurement to two practical, competent men, and in case of their disagreement they were to choose a third.

When appellee had laid the brick in the first and second stories, owing to the embarrassed condition of the business of the country, appellants were not able to collect money, and they notified appellee to stop work on the building until they should

give him further directions. He quit work, and subsequently claimed damages, and filed a petition to enforce a mechanic's lien for the amount due him for labor on the building. It was subsequently agreed by the parties, that appellants should pay appellee $500 on the sum they owed him, and that he should proceed with his part of the work, and to be paid a reasonable compensation, without regard to the price fixed by the original contract, and appellee waived all claim for damages against the association by reason of their having stopped the work. He proceeded with and completed the brick work on the third story; and when the parties came to measure the work, a disagreement arose as to how it should be made —whether all the openings should be measured and estimated as solid work, or whether all of such open space should be excluded. On the trial a large number of witnesses were examined on the question, and, as is usually found, their evidence is not entirely harmonious.

In the view we take of this case, we regard that question as immaterial. Appellee, by the terms of the contract, was to be paid a reasonable compensation for his work, without regarding the price fixed by the first contract. The question, then, for the determination of the jury, was, how much was a reasonable compensation? They heard all the evidence, and found that the sum specified in their verdict was but reasonable. The evidence of appellee's witnesses, we think, clearly shows that the amount allowed by the jury was but reasonable. With pilasters, cornice and ornamental work, it is to be inferred that the work was worth more than the same number of brick in plain solid walls. Arches seem to have been turned, and the jams of the windows had to be carefully faced, which would consume time.

The witnesses all agree that the building of the third story was worth more than the first or second; but they differ widely as to what the difference is. They differ from one to four dollars per thousand. If the jury took the brick actually placed in the wall, which was about 140,000, and

allowed him $7.50 per thousand, that would give him $1050 for laying the brick; and if they allowed him $54.50 for extra work, we then have the amount found by the jury. And when it is remembered that several witnesses fixed the reasonable value of the work at $7.50 per thousand, or, as some of them expressed it, at double the original contract price, we are unable to say the finding is excessive.

As to what is reasonable compensation, is a fact to be found by the jury. In this case they heard the evidence, they saw the witnesses, and had every opportunity to estimate the value of their testimony; and there are no grounds for saying that the finding is against the evidence, or even clearly against its weight. We think it is sustained by the evidence, and should not be set aside.

The jury seem to have taken the actual number of brick, estimated by excluding all openings, and then allowed the highest price proved by several witnesses. And we can not say that their mode of disposing of the question is not fair, just, and sustained by the evidence.

This view of the case renders the consideration of the question of custom, and whether it was proved, unnecessary, or whether the refused instructions announced correct legal propositions, as they were abstract and not pertinent to the issue in the case. Had they been given, they would have afforded no assistance to the jury in arriving at a conclusion.

We perceive no error in the record, and the judgment of the court below is affirmed.

Judgment affirmed.

LEMUEL B. GREGORY

v.

ANDREW MARTIN, Admr.

1. PARTNERSHIP—*sufficiency of evidence to show.* Where two persons purchased a mill and house, which they commenced to remove, but before the removal, one of them died, it was *held*, the general declarations of the deceased that they had bought the mill in partnership, no terms of partnership being stated, did not afford satisfactory evidence of the existence of a partnership, as such declarations might well consist with there being nothing more than a tenancy in common.

2. SAME—*evidence of a settlement.* Where A and B purchased a mill and house, for which A turned in two mules, a wagon and harness, in payment for his half of the price, and then died at B's house, while the mill was being removed to B's, and at the appraisement of A's estate, B brought to the appraisers other property, and had the same appraised as A's property, agreeing that if there was any difference in favor of the estate between the property thus produced for appraisement and that which A had paid on their joint purchase, he would pay it, and if it was in his favor the estate should pay him, it was *held*, in a suit by the estate to recover the difference, that the conduct of B, in producing the property for appraisement, and statements made, might properly be considered by the jury as tending to show a settlement and promise between A and B, before A's death.

APPEAL from the Circuit Court of Wayne county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. JAMES MCCARTNEY, for the appellant.

Messrs. ROBINSON, BOGGS & JOHNS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

James Martin and Lemuel B. Gregory purchased a mill at or near Iuka, in Marion county, in this State, in payment for one-half of which Martin turned in two mules, and a wagon and harness.

The mill was taken down at Iuka, and they had commenced hauling it to Gregory's place, to be put up there. While so

engaged, Martin was taken sick, and died in a few days afterward at Gregory's.

Andrew Martin, the appellee, was appointed administrator of the estate of James Martin; and while the appraisement of the estate was being made, Gregory brought to the appraisers two mules, a wagon and harness, and wanted them appraised as James Martin's property, and said if there was any difference between them and the property James Martin turned in on the mill, if it was in his favor the estate should pay him, and if it was in favor of the estate he would pay it. The property was sold with the other property belonging to the estate of James Martin.

This suit was brought by the administrator, against Gregory, to recover for the alleged difference in value between this property and that which James Martin turned in toward payment for the mill. The suit was originally brought before a justice of the peace, where plaintiff recovered. Defendant appealed to the circuit court, where there were three successive verdicts rendered against him, the last one for $75, from the judgment whereon defendant took this appeal.

The principal ground insisted upon for the reversal of the judgment is, that the great preponderance of the evidence showed that there was a partnership between James Martin and Gregory in the mill, and hence this action would not lie. The evidence as to any partnership consisted wholly of the respective declarations of James Martin and Gregory, and that was conflicting, those of Gregory going to show that there was no partnership, those of Martin that there was one. These latter declarations of Martin were not very satisfactory evidence of the existence of any real partnership. They were mere general declarations that they had bought the mill in partnership. No terms of any partnership were stated. Such declarations might well consist with there being nothing more than a tenancy in common between them of the property. Nothing was done more than to make the purchase of

the mill, and to commence the removal of it to Gregory's place.

We do not think it a case where a court is called upon to disturb the finding of the jury, upon the evidence.

This instruction was given for the plaintiff:

"That even if the jury believe, from the testimony, that the deceased and the defendant were partners, yet if they further believe that such partnership was settled up, and the amount due from one partner ascertained, and a promise, expressed or implied, made to pay the same, that the estate may recover such amount."

Objection is taken to it, that it does restrict the settlement and promise named to the time *before the death of James Martin;* but there having been so little done in this mill enterprise, and as Martin being at Gregory's in his last sickness, and dying there, there might be ground of inference with the jury, from the conduct of Gregory in bringing the property before the appraisers, and his statements there made to them, that there had been such a settlement and promise between Gregory and the deceased, before his death, we can not regard the instruction here as fatally defective in the particular named.

We are of opinion the judgment should be affirmed.

Judgment affirmed.

ONECIA HAGEBUSH

v.

WILLIS A. RAGLAND.

1. BAILMENT—*to whom loan made.* Where a married woman requested of a party the loan of a horse to visit her brother, and, about a week after, her husband and son went for the same, and, not finding the owner at home, the husband sent the son, who procured the animal, which was

used to make the visit, it was *held*, that the jury were warranted in finding the loan was made to the wife, notwithstanding she may not have directed her son to get the animal, or may not have known that he had gone for it when he did.

2. SAME—*degree of care required in case of a loan.* Where an animal is borrowed without hire, the borrower is bound to use extraordinary care of the same, and for any failure of such duty, resulting in injury to the lender, the borrower will be liable.

3. PARTY AT LAW—*in suit against borrower.* Where a wife borrows property, which is injured before its return, she alone is liable to the lender, and it is not error in the court to allow a dismissal as to the husband, on appeal, when both have been sued before a justice of the peace. It would be otherwise if the husband was liable.

APPEAL from the Circuit Court of Washington county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. VERNER & WATTS, for the appellant.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action brought by appellee, before a justice of the peace, against appellant and her husband, to recover for injuries to a mare. It appears that the son of appellee went to appellant and borrowed the mare. She was returned to his pasture, where he found her, as he says, apparently much injured, by having been beaten and injured. The animal died two or three days afterwards. Appellee claims that he loaned the mare to appellant, whilst she, on the other hand, insists that the animal was loaned to her husband.

On a trial before the justice of the peace, appellant recovered a judgment for $75, and the wife alone appealed. The clerk of the circuit court issued a summons to appellant, and it was served, but none was issued for the husband of appellant. The cause was continued at the first term of the circuit court after the appeal was taken. At the next term, a trial was had, resulting in a verdict and judgment for the same amount as that rendered by the justice of the peace; but, on the trial, plaintiff dismissed the suit as to the husband, and the verdict was against appellant alone, and upon

which a judgment was rendered, and from which this appeal is prosecuted.

On the trial, the evidence shows that, about a week before the mare was got of appellee, appellant asked him for the loan of a horse, to visit her brother; that when the animal was procured, the husband and son went to get it, but appellee not being at home, they went on to Helm's store, from whence the father sent the son for, and he got the animal. She was used in making the journey to appellant's brother's. The husband was seen beating the animal, and the person who saw it, heard the blows at the distance of near a quarter of a mile.

Appellant, her husband and son all swear that she did or said nothing in connection with the loan of the mare, nor did she even know of the fact until after the animal was brought to her house. Appellee swears that the son said his mother had sent him for the animal, but this he positively denies, and swears he informed appellee that his father had sent him. When the parties were endeavoring to settle, a witness, who was present, swears that appellant admitted she had asked for the loan of a horse, the week previous, but she also denied having done so, in the same conversation. She, when on the stand as a witness, stated that she had asked for the loan of a horse, but that, being in conversation with appellee in reference to her husband being subject to spasms, on his approach, she, only to turn the conversation, made the request.

It appears, from the evidence, appellee and the husband of appellant were in the habit of exchanging farm work, and appellant's husband had frequently borrowed horses from appellee, prior to this time.

Was this evidence sufficient to sustain the finding of the jury? We think it was. It stands admitted, that appellant asked the loan of a horse, to go on a visit to her brother. The animal was procured and used for the purpose. The visit seems to have been made by the family, and we may readily suppose the time when it should be made, and how

it should be accomplished, the family not having a suitable animal to make the journey, had been a matter of discussion, in which she doubtless took a part. She could not have been ignorant of the time when, and the manner in which the journey was to be made. She had asked for the loan of a horse for the purpose, and this one was obtained and used for the purpose, in pursuance of that request. She may not have given directions to her son to go for the mare, or even have known that they had gone for her, but appellant must have known that the mare was to be obtained in pursuance to her request, and for the purpose, and appellee had every reason to suppose, and no doubt did suppose, that he was loaning the mare to appellant, and the jury were fully warranted in finding that appellee did loan the animal to appellant.

It is, however, objected, that the court erred in permitting appellee to dismiss as to the husband. In view of the finding of the jury, there was no error in this action of the court. Had it appeared that the husband alone, or he and appellant, borrowed the mare, then there would have been no legal right to recover against appellant, but as she was alone liable, this was not error.

It is insisted that the court erred in giving appellee's instruction. It informs the jury that, if the animal was borrowed, and that appellant borrowed her without hire, then the borrower was bound to use extraordinary care of the property; and that, if there was a failure of that duty, and the mare died by reason thereof, then defendant would be liable.

Story, in his work on Bailment, section 237, lays down the rule in this language: "As the loan is gratuitous, and exclusively for the benefit of the borrower, he is, upon the common principles of bailment already stated, bound to extraordinary diligence, and of course he is responsible for slight neglect in relation to the thing loaned." He refers to Jones on Bailment, 64 and 65, and that author fully sustains the doctrine. See, also, Parsons on Contracts, Vol. 1, p. 590, and *Coggs* v. *Bernard*, 2 Ld. Raymd. 919. This is the long

and well recognized law, and we were not prepared to find it questioned. The instruction is strictly in conformity to the doctrine thus announced.

We are unable to perceive any error in this record, and the judgment must be affirmed.

Judgment affirmed.

WILLIAM NICHOLS

v.

WILLIAM B. BRADSBY.

1. INSTRUCTIONS. It is improper to give an instruction where there is no evidence to which it is applicable.

2. CONSIDERATION—*settlement of a disputed claim.* Where there was a claim made by one party that a deed for land, executed by him to another, was only in the nature of a security for a debt, and that he was entitled to the surplus of the proceeds of the sale of the land, over the amount of his indebtedness, and the other party claimed that the deed was absolute, and not by way of security, and the parties settled the controversy by dividing the surplus, it was *held*, that there was sufficient consideration to support the settlement.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. JAMES M. DILL, for the appellant.

Messrs. C. W. & E. L. THOMAS, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The claim made by appellee is, that, being indebted to appellant for money loaned, and usurious interest thereon, to the amount of $2450, for which he executed and delivered to him, on the 21st of October, 1869, his promissory note, payable fifteen months after date, he, at the same time, also exe-

cuted and delivered to appellant his warranty deed for a certain tract of land in St. Clair county; that this deed was, in fact, only intended to secure the payment of the note, and that appellant, at the time of the making of the deed, executed and delivered to appellee a bond, obligating himself to reconvey the land to appellee upon the payment of the note. Appellant admits the execution of the deed and a bond, but claims that the land was absolutely sold and conveyed to him, and that the bond was merely an obligation binding him to re-sell and convey to appellee, for a stipulated price, within fifteen months. He denies that any promissory note was given, or that there was any subsisting indebtedness from appellee to himself, to be recognized after the conveyance of the land.

Appellee failed to redeem, or repurchase, as the case may have been, within the fifteen months; and, in February or March, 1871, appellant sold and conveyed the land to one Schaefer, for $3275. By the agreement of the parties, appellee remained in possession of the land, and, after the sale to Schaefer, he refused to surrender possession to him until he could have a settlement with appellant. Shortly thereafter, appellee met and had a settlement with appellant, when appellant paid him $400, being what they estimated as one-half of the excess in price for which appellant sold the land to Schaefer beyond what it was estimated at in the conveyance of appellee to appellant. Appellee then surrendered the possession of the land to Schaefer, and repeatedly declared to others that he and appellant had settled.

Appellee claims that the bond and note were exchanged between himself and appellant after the conveyance to Schaefer, while appellant, admitting that the bond was then returned to him, denies that he returned the note to appellee, or that he ever had any note from him. Neither the bond nor the note was produced on the hearing—each party claiming to have mislaid or lost that in his possession, so that he was unable to find it.

Appellee brought suit in assumpsit to recover the excess in the price for which appellant sold the land to Schaefer, above the amount of his indebtedness to appellant.

The verdict of the jury, upon which the court gave judgment, was in favor of appellee, for $498.94.

The court, at the instance of the appellee, gave to the jury this instruction:

"The court instructs the jury that even if they believe, from the evidence, that Nichols paid Bradsby some money after this cause of action, if there is one, accrued, and that Bradsby remarked 'that settles it,' or words to that effect, and that the sum so paid was not as much as Bradsby has proved to be due him at the time of the payment, this constitutes no settlement or release of said cause of action, unless Bradsby and Nichols both clearly and fully understood at the time that the sum so paid should be in full of all claims included in this action, and were both fully informed of their rights and claims against each other, and had them in mind at the time, and intended to settle them all, and if Bradsby understood one thing and Nichols another, the payment is not to be considered by the jury to be a settlement."

We are of opinion this instruction was improperly given. We have, in vain, looked through the record to find any evidence to which it is applicable. No witness shows there was any mistake or misapprehension by appellee as to his rights when the settlement was made. Appellant says that he paid the $400, not because he recognized any previous agreement binding him so to do, but because he did not care to keep all he had made on the land. Appellee, in his evidence, makes no allusion to, or attempt to explain, the settlement. That he was, at the time, satisfied with it, is proved by several witnesses, one of whom, besides appellant, was present when it was made, and others swear to his declarations that he and appellant had settled, unaccompanied by any words of reservation or complaint; and, also, by the fact that he thereupon

surrendered the bond which he held against appellant for a conveyance and the possession of the land.

Waiving the question whether, under the facts proved by appellee, assumpsit for money had and received to his use, by appellant, will lie, we are clearly of opinion that the evidence of this settlement between the parties is such as to preclude appellee from recovering.

It may be, indeed, if it were clearly proved that appellant was trustee for appellee, the evidence would be insufficient; but that is not conceded, and seems to have been one of the points in dispute between the parties when the settlement was made.

Appellee claims that, by the terms of his agreement with appellant, he was to have any surplus for which the land sold, beyond the amount of his debt, and interest, to appellant. Appellant, on the contrary, denies the agreement, and claims the conveyance to him was absolute, and unaccompanied by conditions.

There was surely enough doubt here, as to the rights of the parties, to form a sufficient consideration for a contract, and if so, upon what ground shall their adjustment be disturbed? We do not feel at liberty to presume, in the absence of evidence, that appellee was ignorant of the strength of his claim against appellant, or that he was overreached in making the settlement.

We think the judgment should be reversed and the cause remanded.

Judgment reversed.

JOHN B. BOWMAN

v.

HENRY A. CUNNINGHAM.

1. SPECIFIC PERFORMANCE—*addressed to the sound discretion of the court.* An application for the specific performance of a contract is addressed to the sound legal discretion of the court; and even where a legal contract is shown to exist, it will not be decreed as a matter of course.

2. SAME—*contract must be certain and fair.* As a general rule, courts of equity will decree a specific performance where the contract is in writing, and is certain and is fair in all its parts, and is based upon an adequate consideration, and is capable of being performed, but otherwise not.

3. If the contract is not certain, and it is not clear, from the evidence, that the exact terms thereof were agreed upon and understood by the parties, and the contract is not fair in all its parts, it will not be specifically enforced.

4. SAME—*of contract, where the party's right grows out of a prior champertous agreement.* A court of equity will not lend its aid to decree the specific performance of one contract which grows directly out of another, which is illegal, immoral, or tainted with champerty.

5. SAME—*of contract rescinded.* If, after the making of a written contract, a dispute arises as to its terms, etc., and the complainant proposes to set aside the entire negotiations, and for the surrender of all papers held by either party, which is accepted by the other party, the complainant can not have a decree for the specific performance of the contract thus rescinded.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. W. H. UNDERWOOD, and Mr. R. A. HALBERT, for the plaintiff in error.

Mr. GUSTAVUS KŒRNER, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Henry A. Cunningham, in the circuit court of St. Clair county, against John B. Bow-

man, to enforce the specific performance of an alleged agreement for the interchange, by deed of conveyance, of certain town lots in the city of East St. Louis.

The circuit court, on the hearing, entered a decree substantially as prayed for in the bill, to reverse which this writ of error has been prosecuted.

The facts connected with the transaction, upon which a court of equity is called upon to decree a specific performance of a contract, are peculiar. John McKnight originally owned the property. He died in 1822, leaving as his heirs nine brothers and sisters, most of whom have since died. At the time (in the year 1866) that negotiations commenced between complainant and defendant, the property was claimed by and was in the possession of the defendant.

Samuel Galloway, of Ohio, held deeds from thirty or forty of the heirs of John McKnight, in trust for them, and, to secure himself, a contingent fee of one-half of what should be realized. Cunningham made a similar arrangement with a few of the heirs in St. Louis, and they made a deed to him. He then made an arrangement with Galloway, by which he was to receive one-half of what Galloway should realize. Cunningham then entered into a contract with Millard, an attorney, who had been a partner of the defendant, to give him one-half of what he should make, and Millard contracted with Davis, an attorney, to share what he would realize out of the transaction equally with him.

After these preliminary arrangements had been settled, several of the tenants of the defendant, in possession of a portion of the property, were induced to attorn to Cunningham, after which a compromise was proposed.

On the 24th day of October, 1866, a meeting was had between the parties, at the office of Cunningham, in St. Louis, the object of which was to effect a settlement in regard to the property. At this meeting, it is claimed, by complainant, a contract was made, and this bill is filed to enforce it.

While it is clear some sort of an arrangement was attempted

to be made, yet, from the facts in evidence, it is equally clear that it is impossible to determine, with any degree of certainty, the time, character, terms or conditions of the agreement.

One agreement was signed by the parties, which was as follows:

"This agreement, made and entered into this the 24th day of October, A. D. 1866, between Henry A. Cunningham and John B. Bowman, witnesseth, that the said Cunningham has this day quit-claimed to said Bowman certain lots, in said deed named, in consideration of said Bowman's quit-claim to the remaining lots originally [conveyed] to John McKnight by Thomas Brady, as per deed of record at Belleville, and of his agreement to do or say nothing to invalidate or in any way affect the title or sale of said lots quit-claimed to said Cunningham; and whereas, the said Cunningham has made the same agreement as regards the lots sold by him to said Bowman,

Now, it is mutually agreed between the parties, that any violation of said agreement by either of said parties shall release the other of all obligation in this behalf, and the party so violating his pledge shall be liable to an action for damages therefor. The said Cunningham also agrees, with said Bowman, that he will neither say nor do anything to invalidate the title of said Bowman to certain lots claimed by said Bowman under Thomas Brady, in said town of Illinois, now part of East St. Louis.

"HENRY A. CUNNINGHAM,
"JOHN B. BOWMAN."

This, however, does not purport to be an agreement by which one of the parties is to convey lands to the other. It rather implies that deeds had been made; but even if it was a contract to convey, it refers to deeds which seem to form a part of the contract. And in order to determine the whole contract between the parties, it would be necessary to go to those deeds which form a part.

When, however, resort is had to the deeds, both parties concede they contain material mistakes, and do not express what was intended; that an attempt was made by the parties themselves to reform the deeds, but as they failed to agree, nothing was accomplished in that direction—the deeds were neither acknowledged nor delivered. This is the kind of a contract resort is had to a court of equity to enforce.

An application for the specific performance of a contract is addressed to the sound legal discretion of the court; and even where a legal contract is shown to exist, it will not be decreed as a matter of course. *Frisby* v. *Ballance*, 4 Scam. 287; *De Wolf* v. *Pratt*, 42 Ill. 198.

In 2 Story Eq. Jur., sec. 741, the rule is laid down as follows: "Generally, it may be stated, that courts of equity will decree a specific performance where the contract is in writing, and is certain, and is fair in all its parts, and is for an adequate consideration, and is capable of being performed, but not otherwise."

The contract which is attempted to be enforced by this bill is not certain. It is by no means clear, from the evidence, that the exact terms of an agreement were agreed upon and understood by the parties. Neither is the contract fair in all its parts. Cunningham, as appears from the evidence, claimed to represent eight-ninths of the John McKnight title, which he proposed to convey to the defendant, to a portion of the lots, in order to obtain a conveyance from defendant for the balance. But he did not have, and was not able to convey, what he claimed to represent. He only had a conveyance himself from a few of the heirs, and had no power of attorney or deed from Galloway, who had obtained a deed from a large portion of the heirs. Independent, however, of this fact, the position in which the testimony in this case places the complainant is not such as to entitle him to the favorable consideration of a court of equity.

The contract under and by which he claims to hold and dispose of the McKnight title, which is the foundation of the

alleged agreement this bill was filed to enforce, if not tainted with champerty, is one of that species of contracts which courts of equity do not regard with favor.

It is urged, that there is no champerty in the contract, for the reason the proof fails to show Cunningham and his associates, who have the conditional contracts, were to carry on the litigation to recover the McKnight property at their own costs. It is, however, quite apparent such was the case. In this case but one of the McKnight heirs is called as a witness, and he testifies that he knows nothing of the nature of the cause pending.

While it is true, as suggested, that this litigation is not between Cunningham and the McKnight heirs, and the contract between them is not directly involved, yet a court of equity will not lend its aid to decree the specific performance of one contract which grows directly out of another which is illegal or immoral.

There is another fatal objection to a decree for a specific performance in this case.

Two or three days after the alleged contract was made, as the evidence tends to show, the parties had an interview at the defendant's office, and after some time spent in quarreling over the terms of the agreement, Cunningham proposed to set aside all the negotiations, and broke up the whole arrangement. This, Bowman accepted, and it was then agreed that all papers held by either party should be surrendered.

This version of the closing up of all negotiations is given by the defendant in his evidence, in which he is substantially corroborated by the weight of the testimony submitted upon that question.

If this agreement was entered into by Cunningham and Bowman, and the evidence tends to establish the fact that it was, independent of other considerations, such would be a complete answer to the case made by the bill.

The decree will be reversed and the bill dismissed.

Decree reversed.

SYLVESTER G. DOWNEY, Admr.

v.

CHARLES D. BEACH.

1. USURY—*penalty to secure prompt payment, not usurious.* A provision in a promissory note for the payment of thirty per cent interest per annum after maturity, as liquidated damages for non-payment when due, if inserted for the purpose of securing prompt payment, does not render the transaction usurious.

2. PENALTY—*relief in equity against.* Where a party gives his promissory note for money borrowed, payable in one year, with ten per cent interest, and with thirty per cent per annum interest after maturity, if not paid when due, as liquidated damages, a court of equity will not relieve him from the penalty, where the payee has practiced no deception and done no act to mislead him and induce him to make the note. His ignorance that the note contained such a provision, when he was able to read the same, affords no ground for equitable relief.

APPEAL from the Circuit Court of Jersey county; the Hon. CYRUS EPLER, Judge, presiding.

The opinion of the court states, with sufficient fullness, the nature and facts of this case. The court below decreed the relief sought.

Mr. GEO. W. HERDMAN, and Messrs. WOODSON & WITHERS, for the appellant.

Messrs. DUMMER & BROWN, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This bill was to enjoin a suit at law. Complainant borrowed of Talitha and Charlotte Crane, $500, for which he gave them his promissory note, with Edwin Colean as surety. The note bears date July 26, 1870, payable at one year after date, and bears interest at the rate of ten per cent per annum, with thirty per cent per annum interest after maturity, as

liquidated damages for non-payment when due. Both payees are now dead, and the present defendant, as administrator of the estate of the last deceased, had commenced suit on the note, to enforce collection. A default had been entered, when this bill was filed to prevent the entering of final judgment. With his bill, complainant tenders the principal of the note, with interest at ten per cent per annum compounded, together with all costs of the common law case, and seeks to enjoin the further prosecution of the suit.

This court has repeatedly held that contracts like this one are not usurious, if made with a single purpose to secure prompt payment of the principal sum. Although the party agrees to pay a rate of interest in excess of that allowed by statute, after maturity, it is, nevertheless, regarded as in the nature of penalty to secure prompt payment. In such cases, the penalty is liquidated damages fixed by the solemn agreement of the parties. When made for the sole purpose of securing prompt payment, and understandingly entered into, such contracts are valid at law, and may be enforced. The cases that hold this doctrine are so numerous in this court, it is not necessary to do more than cite a few of them. *Lawrence* v. *Cowles*, 13 Ill. 577; *Smith* v. *Whitaker*, 23 Ill. 367; *Blair* v. *Chamblin*, 39 Ill. 521.

Conceding the fact insisted upon, that the provision for the payment of thirty per cent per annum interest after maturity, is in the nature of penalty, still, in the light of the decisions of this court, the penalty imposed is liquidated damages, which have been the subject of adjustment by the previous agreement of the parties themselves. A court of equity, in all such cases, will withhold its aid, and leave the parties to their legal rights, whatever they may be. There is nothing in the facts alleged in this case that calls for the interposition of a court of chancery on equitable grounds. Complainant charges, he was ignorant of the fact the note contained the provision for the payment of thirty per cent after maturity, and had no knowledge of it until the day he filed his bill.

This was his own negligence, against which it is not the province of a court of law or equity to afford him relief. It is not claimed he could not read, and if he failed to read the provisions of the note when he made it, in the absence of any fraudulent practices to procure the execution, he must bear the consequences.

When the note became due, it was the duty of the maker to pay it, or procure further extension upon such terms as the payees were willing to grant. By paying the note at maturity, he could have relieved himself from the payment of the penalty agreed upon for non-payment. Having failed to avail of his privilege in this regard, it must be understood he did so in view of the fact the damages had been adjusted and fixed by previous positive agreement. He had his election, and a court of equity will not relieve him from the consequences of his own contract. No deception was practiced by the payees, or either of them, to procure the note with the provision for the payment of thirty per cent after maturity. They were guilty of no wrong or oppression. By no act or word did they mislead or deceive the maker into giving the note with the penalty attached. If he has suffered injury that may now seem grievous, it is attributable alone to his own *laches*. It is his own contract, which is valid at law, and a court of equity will not interfere to set it aside.

The decree will be reversed and the bill dismissed.

Decree reversed.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY

v.

JAMES C. LACKEY.

CONSTITUTIONAL LAW—*making railroad company liable for no violation of duty.* The act of 1855 making railroad companies liable for all expenses of the coroner and his inquest, and the burial of all persons who may die on its cars, or who may be killed by collision, or other accident

occurring to such cars, or otherwise, is unconstitutional and void, so far as it attempts to make such companies liable in cases where they have violated no law, or have been guilty of no negligence on their part.

APPEAL from the Circuit Court of Marion county; the Hon. SILAS L. BRYAN, Judge, presiding.

Mr. H. P. BUXTON, for the appellant.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the judgment of the Marion circuit court, rendered at the October term, 1870, upon the following agreed state of facts:

"It was agreed in this case that, during the year 1869, three persons were run over and killed by trains on the railroad of appellant, in Marion county, and the appellee, being coroner of said county at the time, held an inquest in each case, the expenses of which, together with the costs of burial, amount, in the aggregate, to $91.15; that if appellant was, in law, liable to appellee, upon the facts stated, for the above amount, then judgment should be rendered in favor of appellee therefor, and if not so liable, then judgment should be for appellant, with the right to either party to appeal."

In 1855, the General Assembly of this State passed an act entitled "An act to provide for the burial of the dead occurring on railroads, and in or by vehicles carrying passengers," in the second section of which act it is provided that "every railroad company running cars within this State shall be liable for all the expense of the coroner and his inquest, and the burial of all persons who may die on the cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise; and any coroner, city, town or person who shall take charge of and decently inter any such body or corpse, or cause an inquest to be held over such corpse, shall have cause of action against such company, before any court having competent jurisdiction." Sess. Laws 1855, p. 170; Scates' Comp. 423.

It is insisted by appellant, that this statute is not within the constitutional competency of the General Assembly to enact, as it places the burden of these expenses upon the railroad companies, which, in other cases of like nature, is placed upon the estate of the deceased, or upon the county in which the accident may occur. This is the general law. R. S. 1845, ch. 99, title, "Sheriffs and Coroners," sec. 23; R. S. 1874, sec. 21, title, "Coroners."

It may, very pertinently, be asked, why this distinction? On what principle is it that railroad corporations, without any fault on their part, shall be compelled to pay charges which, in other cases, are borne by the property of the deceased, or, in default thereof, by the county in which the accident occurred?

An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases. As argued by the counsel for appellant, the law attempts to place what is properly a public burden upon these corporations, which should be borne

by all alike, and discharged out of public funds raised by equal and uniform taxation.

This may be considered in the light of a special tax, for which there is no sanction in the constitution. We have not been furnished with any brief, points or argument for the appellee. The views presented by appellant satisfy us the law in question can not be sustained as a constitutional enactment.

In 1874, the General Assembly repealed this statute, by chap. 131, title, "Statutes," R. S. 1022, but, at the same session, re-enacted it substantially, giving the power to sue, not to the coroner, as here, but to the county. Ib., title, "Coroners," 283, sec. 22.

For the reasons given, the judgment is reversed.

Judgment reversed.

THE BOARD OF EDUCATION OF DISTRICT NO. 3, etc.

v.

GOTLIEB NEIDENBERGER *et al.*

MECHANIC'S LIEN—*does not lie against school property.* The lien given by statute to a mechanic or material-man, for labor or materials furnished in the erection of a building, does not attach against property held for public school purposes.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was a petition filed by Gotlieb Neidenberger and J. George Gerding, partners composing the firm of Neidenberger & Co., against the Board of Education of District No. 3, in town. 3 north, range 8 west of the third principal meridian, for the enforcement of a mechanic's lien for materials furnished by petitioners, as sub-contractors of Wm. H. Phillips & Bro. On the hearing, the court below found a lien in favor

of the petitioners, for the sum of $1265, and required payment to be made in thirty days, with costs of suit, and in default thereof ordered sale of the school house and premises, in the usual form.

Mr. A. W. METCALF, for the appellant.

Messrs. IRWIN & KROME, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The only question we deem it necessary to consider in this case is, whether the law securing a mechanic's lien was intended to and does embrace contracts for building or repairing common school houses—whether the directors of a school district, legally organized, represent a body corporate or politic that falls within the meaning of a person, as defined by the statute.

The lien law gives to any person who, by contract with the owner of any tract of land or town lot, shall furnish labor or materials for the erection or repair of any house, etc., a lien on the whole tract of land or town lot, as therein provided. The first section of the act of 1869 gives to a sub-contractor, mechanic, workman, or other person who, in conformity with the terms of the contract with the owner or lessee of any lot or piece of ground, shall perform any labor or shall furnish any materials in building, altering, repairing, etc., of any building, etc., a lien, on the terms therein prescribed.

We shall first inquire whether the statute gives a lien on a school house, as against the directors, trustees or district, to the original contractor, as, if none is given to him it will hardly be contended that the sub-contractor can have a lien. If it was not intended by the General Assembly to subject such property to the lien of the mechanic or material-man, neither contractor or his sub-contractors would have any lien on such property.

All persons will see, at a glance, that the policy which dictated the passage of these laws was a desire to secure payment for materials furnished or labor performed in the construction of buildings, and their repair. This was the manifest object of the law. And it will be seen that the same object is accomplished in another mode by section 49, Laws 1857, page 278, which declares, that if judgment shall be obtained against any township board of trustees of schools or board of directors, the person entitled thereto shall have execution by the circuit court in which the judgment is recovered, or to which a transcript of the judgment is taken from a justice of the peace, by issuing a writ, commanding the directors, trustees and treasurer of such township to cause the amount thereof, with interest and costs, to be paid to the party entitled thereto, out of any unappropriated moneys of such township, or, if there be no such moneys, out of the first moneys applicable to the payment of the kind of services or judgment for which the recovery was had, and to enforce obedience to such writ by attachment, or by *mandamus*, requiring such board to levy a tax for the payment of the judgment.

Here is a sure and complete remedy given for the enforcement of all just claims against such bodies. The party has but to obtain his judgment, and, if there be money in the treasury, to obtain an order on the treasurer for its payment, and if there is no money applicable for its payment, then to obtain a writ of *mandamus* to compel the levy and collection of a tax for its payment. This proceeding is restrictive of the common law power to issue a *fieri facias* to collect the judgment. It is manifestly in restraint of that right, as it provides that execution shall be had in that mode, which, by fair and reasonable intendment, excludes the supposition that it was intended to be cumulative to the common law remedy, and was intended to be exclusive.

This is rendered obvious from the very nature and purposes of creating these incorporations. They are brought into existence to subserve a great public policy—to give to

every child of the State a common school education. And these bodies are created for the promotion of this great public interest, and they are clothed with such power only as will enable them to accomplish this public purpose. They are clothed with none of the usual powers that are granted to private corporations, nor were they authorized to enter into commercial pursuits, but simply to perform their duties to the public.

The education of the children in the State has been assumed as a duty devolving upon the government, and it has chosen the present school system as being the best adapted to that end; and these bodies are created to effectuate that policy, and are essentially as public as are municipal corporations. They are as much the instruments of government, and are as essential in carrying on its functions, as are cities, towns and villages.

It, therefore, follows, that a sound public policy would dictate to the law-making power that these bodies should not be liable to be destroyed, by having their houses and property sold for the payment of their debts. Hence the mode adopted, to have execution, and thus preserve their property, and at the same time give the creditor a sure and as efficacious a remedy as by *fieri facias*. In carrying out that policy, it never could have been intended to permit the houses and property to be sold and lost by a decree for a mechanic's lien, when such care was taken to prevent it from being sold under a *fieri facias*. It would, in every way, be opposed to the obvious policy of the law, in inaugurating and maintaining our school system. And in conformity to that obvious design, we are constrained to hold that a mechanic's or material-man's lien does not attach against property held for public school purposes. Such property, although the title is not vested in the State, still is held for public use, and was not intended to be sold, except in the mode prescribed by the school law.

We are, for these reasons, clearly of the opinion that the court below erred in rendering the decree, and it is reversed.

Decree reversed.

J. POOL MEAD
v.
JOSHUA THOMPSON.

1. LANDLORD'S LIEN—*not dependent upon a distress.* A landlord's lien upon crops growing or grown upon the demised premises in any year, for rent that shall accrue for such year, does not depend upon the levy of a distress warrant, but is given by the statute, so that an attaching creditor can not, by bringing an attachment before the issuing of the distress warrant, gain any precedence.

2. TROVER AND TRESPASS—*what act will make a party liable for a conversion.* It is not necessary, to render one liable in trespass or trover, that there should be an appropriation of the thing to the party's own use or beneficial enjoyment. The disposing, or assuming to dispose, of another man's goods, without his authority, is a conversion of them.

3. SAME—*liability of bidder who transfers his bid.* Where a creditor of a tenant attached the crops of the latter, upon which the landlord had a lien for rent, and, after the levy of a distress warrant, purchased the same at the sale under his attachment, and transferred his bid to a third person, who took and disposed of the crops: *Held*, that the creditor, by bidding off the property and transferring his bid, assumed such control over the property as amounted to a conversion, and rendered him equally liable with his assignee to the landlord for the amount of his lien for rent.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. GILLESPIE & HAPPY, for the appellant.

Messrs. IRWIN & KROME, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

One Lydia Kyle, in 1870, was a tenant on the place of appellee, Joshua Thompson, and had put in that year a crop of some 16 acres of corn on the premises. On the night of the 9th of September, 1870, Mrs. Kyle abandoned the premises and left the State, being indebted to Thompson for rent of the premises, about $69. On the 12th of September, 1870, Thompson issued his distress warrant for the rent, which was levied on the crop of corn left on the premises.

The distress warrant was returned to a justice of the peace September 12th, 1870, as having been levied upon the crop of corn, and that the tenant was not found. Nothing further was done thereunder until November 19, 1870, when Thompson appeared before the justice of the peace and made oath that the tenant had abandoned the premises and left the State, whereupon the proper notices were issued and posted, and the case continued ten days. On the 28th of November, 1870, judgment was entered against the tenant by default, for $69, and an order of sale of the property.

On the 10th of September, 1870, an attachment, at the suit of one George W. Mead, against the absconded tenant, was issued by a justice of the peace, and levied upon two-thirds of the corn, leaving one-third for the landlord as rent. Judgment was obtained in the attachment suit, and, on the 10th of October, 1870, the corn so levied on was sold at public sale under execution upon the judgment, by George W. Richardson, as constable, and purchased by J. P. Mead, the appellant.

This suit therefor was brought by Thompson against Richardson and Mead, and a judgment recovered against them for $69, from which Mead brings this appeal.

There are but two points raised by appellant. The first one is, that the landlord's lien here for rent has been waived or lost, as against the attaching creditor, by *laches*.

The landlord's lien, in such case as this, is not dependent upon the levy of a distress warrant, but is given by the statute, the statutory provision being express that, "every landlord shall have a lien upon the crops growing or grown upon the demised premises in any year, for rent that shall accrue for such year," so that there was no precedence gained here by the levy of the creditor's writ of attachment before the levy of the landlord's distress warrant.

The plaintiff testified that he supposed the rent was due when the corn was ripe; that it was not ripe on the 9th of September, 1870. The statute provides that, when a tenant

abandons or removes from the premises, the landlord may seize upon any grain or other crops grown or growing upon the premises, whether the rent is due or not. But this same case has previously been before this court, (*Thompson* v. *Mead et al.* 67 Ill. 395,) and in the decision then made, this point, which is now urged, was sufficiently disposed of adversely to appellant, and we need but refer to that case.

It was there said: "The law creates the lien, and from its very nature, and under the statute, it must have precedence unless it has been waived, or the landlord has been guilty of *laches*—neither of which was or could be set up in this case."

The other point made is, that, as Mead merely bid off the property at the constable's sale, and then turned over his purchase to one McMichael, who paid for the property and took and disposed of it, and there was no further intermeddling whatever with the property by Mead himself, than as above named, there is no liability to a suit on the part of Mead.

It is not necessary, to render one liable in trespass or trover, that there should be an appropriation of the thing to the party's own use or beneficial enjoyment.

The disposing or assuming to dispose of another man's goods, without his authority, is a conversion of them. Mead, by bidding off the property at the attachment sale, and transferring his bid to McMichael, assumed such control over the property as amounted to a conversion. It was an act of co-operation on the part of Mead, in the taking and conversion of the property by McMichael, which would render him equally liable with the latter. See *Everett* v. *Coffin*, 6 Wend. 603; *Hamilton* v. *Hunt*, 14 Ill. 472; 2 Hill. on Torts, 309, sec. 9.

The judgment will be affirmed.

Judgment affirmed.

Syllabus.

THE CARONDELET IRON WORKS

v.

GEORGE S. MOORE *et al.*

1. CONTRACT—*time for exercising an option reserved.* Where a contract for the purchase of all the iron manufactured up to a certain date, by a company, provided that the proportion of white and mottled iron should not exceed ten per cent of the quantity of gray mill iron, and in case of such excess, the purchaser should have the option to reject such excess: *Held*, that the purchaser was bound to accept and pay for all the iron manufactured, except as to such excess, and also, that unless the option to reject it was manifested in a reasonable time after the quantities were ascertained, and notice thereof given.

2. WARRANTY—*statement in bill rendered not regarded.* The mere description of iron sold, as mill iron, in a bill rendered to the purchaser, will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality.

3. SAME—*words used must show an intent to warrant.* While no particular form of words is required to make a warranty, and it is not necessary that the word warrant be used, still it is necessary that such expressions should be used as to show the intention of the party to bind himself to make good the quality of the articles as described or represented, and not a mere statement or expression of opinion as to the quality.

4. FRAUD—*in sale of property, as to quality.* Where the purchaser of personal property sees the property before taking possession, and has every opportunity to inspect the same, and no concealment is used on the part of the seller, or representations made respecting the quality, to induce the purchaser not to examine the same, the purchaser can not recover on the ground of fraud and deceit.

WRIT OF ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. HITCHCOCK, LUBKE & PLAYER, and Messrs. G. & G. A. KŒRNER, for the plaintiff in error.

Messrs. NOBLE & ORRICK, and Messrs. UNDERWOOD & NŒTLING, for the defendants in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by Geo. S. Moore and Geo. D. Morris, partners, composing the firm of Geo. S. Moore & Co., against the Carondelet Iron Works, in the circuit court of St. Clair county.

The declaration contained two counts. The first, for money had and received; the second set out a written contract entered into between the parties, under which the iron works had sold plaintiffs the entire product of all iron manufactured at its furnace during a specified time, at a certain price, and concludes with an averment that, on, to-wit: February 12th, 1873, the defendant knowingly and falsely pretended and warranted that it had manufactured, for the plaintiff, 610 tons of mill iron, and piled the same in the yard of defendant for the plaintiffs, and the plaintiffs, relying upon the truth of the representations and warranty, paid $45 per ton for the same, being the sum of $27,450; when, in fact, none of said iron was mill iron, as represented and warranted, but all of the same was white-mottled iron, an article of inferior value.

To the declaration, the defendant pleaded the general issue. A trial was had before a jury, which resulted in a verdict in favor of the plaintiffs, for $14,228. The court overruled a motion for a new trial, and rendered judgment upon the verdict, to reverse which the defendant has brought the record here by writ of error.

The contract entered into between the parties in regard to the iron bears date July 27th, 1872, and it provides: "That the Carondelet Iron Works have this day sold to the said George S. Moore & Co. the entire product, more or less, in pig iron, of their furnace, from the 1st day of August, A. D. 1872, to the 31st day of December, A. D. 1872, inclusive, at ($50) fifty dollars No. 1 foundry, ($48) forty-eight dollars No. 2 foundry, ($45) forty-five dollars for mill, and ($43) forty-three dollars for white and mottled iron, the proportion of white and mottled iron not to exceed ten per cent of the

quantity of gray mill iron; and in case of such excess of white and mottled iron, said George S. Moore & Co. have the option to reject such excess over ten per cent; the said iron to be weighed at the furnace, and delivered at the furnace landing, on boats or cars, free of charge; payments to be made on the first days of each month, in cash, for all the iron made during the month last preceding, whether taken away or not."

On the 12th day of February, 1873, the defendant rendered a statement to Moore & Co., as follows:

"ST. LOUIS, *Feb.* 12, 1873.

Messrs. GEORGE S. MOORE & Co.,

Bought of Carondelet Iron Works:

138 tons No. 1 Iron, 50	$6,900
400 tons No. 2 Iron, 48	19,200
610 tons *Mill* Iron, 45	27,450
	$53,550

Certificate sent, and iron piled in our yard.

C. I. W. per McN———."

The controversy in this case grows out of the 610 tons of iron embraced in the statement, for which Moore & Co. paid $27,450, upon the rendition of the account.

It is not claimed that the contract of date July 27th, 1872, was ever in any manner changed or modified by the parties, but it is conceded to be in full force and effect.

To determine, then, the rights and obligations of the parties, resort must be had to the contract under which the iron was manufactured and furnished.

Under the contract, and by its express terms, Moore & Co. purchased the entire product, more or less, in pig iron, of the furnace of the defendant, from the 1st day of August, 1872, to the 31st of December, 1872.

The Carondelet Iron Works did not contract to furnish any definite amount of any particular grade of iron, nor was it concluded by the contract as to the quantity of the entire pro-

duct, or as to the amount of each grade, or as to the quality of the iron to be manufactured.

The iron works was absolutely bound to deliver to the plaintiffs the entire product of its furnace which should be manufactured between the specified dates named in the contract.

On the other hand, Moore & Co. were bound by the contract to accept and pay for the entire product of the furnace, except an option was reserved on their part: in case the white and mottled iron manufactured exceeded ten per cent of the quantity of gray mill iron, then they had the option to reject such excess over ten per cent.

It is clear, by the terms of the contract, the entire product of the furnace was purchased by the plaintiffs, unless they, when the quantity of mill and of white and mottled irons was ascertained, should elect to reject a given quantity of the latter, as provided by the contract, and within a reasonable time exercise that option.

It is not averred in the declaration, nor shown by the proof, the amount of mill or white and mottled irons manufactured at the furnace from the 1st day of August, 1872, to the 31st day of December. Under such circumstances, we are at a loss to conjecture upon what principle or by what authority Moore & Co. would have the right to reject any portion of the white and mottled iron, as the contract only gave them the option to reject the excess of white and mottled iron over ten per cent of gray mill.

It is true, Moore testified that the defendant delivered his firm from 1800 to 2000 tons of iron under their contract, and that this embraced No. 1 and No. 2 foundry, and gray mill iron, as defendant billed it to them, and, upon his re-examination, he says he told Cashmon, in December, 1873, that he refused to take any of the iron except the ten per cent, and it amounted to 2 tons and a fraction on the 21 tons which had been shipped, etc.

But this can not be regarded as sufficient to establish a foundation for an option under the contract.

The plaintiffs were bound to take the white and mottled iron manufactured, unless it exceeded ten per cent of the gray mill, and unless, also, they, within a reasonable time, elected to reject such excess over ten per cent, and give the defendant notice of that fact.

In order to show, therefore, that they were not required to take white and mottled iron, it devolved on them to show the amount of gray mill produced by the furnace, and the amount of white and mottled iron, and that the latter exceeded ten per cent of the former, and that they elected not to take such excess, and duly notified defendant of such fact. The evidence introduced was entirely insufficient to establish the fact of an election on the part of plaintiffs, and notice to the defendant.

But even if the proof had established the fact that there was an excess of white and mottled iron over ten per cent of gray mill, under the evidence, the verdict could not be sustained.

On the 31st of December, 1872, the defendant had finished the manufacture of the iron. In the early part of January following, Moore, one of the plaintiffs, and James P. Card, an authorized agent of the plaintiffs, who also was interested with them in the purchase, went to the iron works, saw the iron, and had full and ample opportunity to make as thorough an examination of it as they desired. After they had looked the iron over, they requested the superintendent to have it weighed, with a view to a settlement.

On the 8th day of February, the defendant had the iron stacked in convenient piles for shipment, and weighed. On the 12th of the same month, an account of the iron was rendered, and it was paid for.

In the spring of 1873, plaintiffs' agent again visited the yard, and had an opportunity to examine the iron. In the month of March, 20 tons were sold to a party in Indianapolis.

In October, warehouse receipts were taken for 467 tons of the iron, and upon them money was borrowed. After thus accepting the iron, and assuming the exclusive control over it, and on the 31st of December, 1873, the plaintiffs discovered, as they claim, the iron was not of that quality called for by the contract. A notice in writing was served upon the defendant, in which it was notified that they declined and refused to accept 607 of the 610 tons. This, together with the warehouse receipts, were formally tendered back, and the money which had been paid for the iron was demanded.

We understand the rule to be, that, where an option is given, unless the time is determined by the contract, it must be exercised within a reasonable time, or the right will be lost.

In this case the plaintiffs saw this iron in the yard after it was manufactured, and had full opportunity to make as thorough an examination as they desired. It was weighed, they paid for it, and assumed the control of the property. Almost an entire year expires before any complaint is made in regard to the quality of the iron. In the meantime, iron has declined in the market almost one-half. Under such circumstances, to hold that the option given by the contract was exercised within a reasonable time, would be unjust, and contrary to the well settled rules of law which must govern a question of this character.

It is, however, claimed by the plaintiffs that the defendant knowingly and falsely pretended and warranted to the plaintiffs that the 610 tons manufactured was mill iron, and that, relying upon such representations and warranty, the iron was paid for; but the record contains no evidence of fraud, false representations or warranty.

It is not pretended that the defendant, or its agents, made any statement or representations in regard to the quality of the iron, except the statement or bill rendered of the iron, dated February 12th, 1873, in which the 610 tons is denominated mill iron.

The question, then, is, can this bill be regarded as a representation or warranty of the quality of the iron?

The superintendent, McNair, testified that he made out the bill from the information, as to quantity and quality, derived from the weigher's certificate, as is usually done in making bills for iron. The 610 tons were weighed at Card's request. After plaintiff Moore and Card, in the early part of January, visited the yard and looked over the iron, and requested it should be weighed, Farnsley, who was the city weigher, did the weighing, and made out a certificate, and this bill, which is relied upon as a warranty, is a mere transcript from the weigher's certificate, with contract prices added.

While no particular form of words is required to make a warranty, nor is it necessary that the word warrant should be used to form such a contract, still it is necessary that such expressions should be used as show the intention of the party to bind himself to make good the quality of the articles as described or represented, and not a mere statement or expression of opinion as to the quality or character of the articles sold. *Adams* v. *Johnson*, 15 Ill. 346.

In *Towell et al.* v. *Gatewood*, 2 Scam. 22, where the vendor of a quantity of tobacco delivered the vendee a bill of the goods sold, signed by him, in which the tobacco was described as good first and second rate, it was held, the language used as to the quality of tobacco was a mere matter of judgment, and did not constitute a warranty.

We do not think the language used in the bill of iron rendered shows that it was the intention of the defendant to bind itself to make good the quality or grade of iron as described, but the designation, mill iron, was a mere statement or expression of opinion as to quality, and can not be regarded as a warranty.

As to the statement or representations being fraudulent, as averred in the declaration, that position is utterly untenable. The plaintiffs had as much knowledge in regard to the quality

of the iron as the superintendent of defendant, who made out the bill. Before the bill was rendered, the plaintiffs saw and inspected the iron in the yard where it was manufactured, where they were at liberty to break it and make as minute an examination as they pleased. No concealment was used or representations made to induce the plaintiffs to believe the iron was of any particular grade, or to prevent an examination into its quality. Everything connected with the transaction seems to have been open and fair. We are, therefore, of opinion that no right of action existed in favor of plaintiffs on the ground of warranty or fraudulent representations.

The 610 tons of iron, however, was paid for at $45 per ton. For whatever portion of it was white and mottled iron, under the contract, plaintiffs were only required to pay $43 per ton. The $2 per ton, therefore, overpaid, they will be entitled to recover back.

The instructions given in this case are voluminous. Various objections have been urged to them, but we have not the time to consider them in detail. So far as they are in conflict with the views here expressed, they are erroneous.

The judgment will be reversed, and the cause remanded for another trial consistent with this opinion.

Judgment reversed.

THERESA PHILLIPS

v.

H. A. PITTS & CO.

1. NOTICE—*possession of property under unrecorded deed.* Actual possession of real estate under an unrecorded deed, although the improvements are not valuable, is sufficient notice to a subsequent purchaser, either at a private or judicial sale, of the occupant's interest and title.

2. CLOUD UPON TITLE. Where a party sells real estate under execution as the property of his debtor, with either actual or constructive notice

of a *bona fide* sale and conveyance to another before the judgment became a lien, the owner may have the sheriff's sale set aside as a cloud upon his title.

APPEAL from the Circuit Court of Effingham county; the Hon. HIRAM B. DECIUS, Judge, presiding.

This was a bill in chancery, filed by Theresa Phillips, against H. A. Pitts, Marsailles M. Pitts, Aurolius V. Pitts and Flawson D. Pitts, to set aside a sheriff's sale of a certain lot as a cloud upon complainant's title. The opinion of the court contains a sufficient statement of the controlling facts of the case. The cause was heard upon the pleadings and proofs, when the court entered a decree dismissing the bill.

Messrs. COOPER & KAGAY, for the appellant.

Mr. J. N. GWIN, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

On the 26th day of August, 1868, complainant purchased of John J. Worman lot 7, in block 1, in Central Effingham, for which she paid him $250, and received a warranty deed. At the October term, 1868, of the circuit court of Effingham county, defendants obtained judgment against Worman, upon which execution was issued on the 14th day of August, 1869, and on the 23d day of October thereafter the premises were sold by the sheriff and purchased by Joseph L. Pitts, one of the plaintiffs in the execution.

Complainant's deed was not recorded until the 9th day of September, 1869, but it is proven the premises, at the time she made the purchase, were in the actual possession of one Fieldhake, who transferred to complainant his possession, and ever since she has had the open and notorious possession, asserting dominion over the property and claiming it as her own as against all others. It is true, the improvements were not valuable, but they were sufficient to indicate actual occu-

pancy. By all the authorities, this was sufficient notice to a subsequent purchaser, either at a private or judicial sale, of complainant's interest in the property. It is in proof, defendants' attorney, whom they employed to examine the title, had actual notice of the sale by Worman to complainant before any levy was made on the property. It is idle to insist defendants are innocent purchasers. So far as this record discloses, complainant purchased in good faith, paid all the property is worth, and, being in the actual occupation under an unrecorded deed, it was notice to all subsequent purchasers. Her equities are, therefore, superior, and must prevail.

The decree will be reversed, and the cause remanded for further proceedings.

Decree reversed.

DANIEL H. BRUSH

v.

THE CITY OF CARBONDALE.

1. INJUNCTION—*from tearing up sidewalk and replacing same by city.* A bill to enjoin city authorities from tearing up a sidewalk in front of complainant's premises and replacing the same by a new one, on the ground that, with slight repairs, the old one would answer for several years, and the change would burden the citizens with heavy taxes and assessments, which fails to show whether the city is incorporated, and makes no reference to its charter, is clearly defective and obnoxious to a demurrer.

2. CHANCERY JURISDICTION—*remedy at law.* A court of equity will not restrain a city and its officers from performing an act which is illegal and unwarranted by law, on the ground that it will necessitate a levy of heavy taxes or special assessments, as the party complaining has an ample remedy at law. In such a case, the tax or assessment will be illegal and void, and its payment can be resisted at law.

3. MUNICIPAL CORPORATION—*when courts will interfere with the exercise of discretionary powers.* A city incorporated under the general law has a large discretion as to the opening, grading and repairing of streets and sidewalks, in respect to the time, manner and cost of the same, in the

exercise of which its power will not be controlled by the courts, unless there is great abuse operating oppressively upon individuals.

4. Where persons or officers are acting within well recognized powers, or exercising a discretionary power, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the oppression of the citizen.

APPEAL from the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. D. H. BRUSH, *pro se.*

Mr. ANDREW D. DUFF, and Mr. DAVID A. NORMAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellant filed his bill in chancery against the city to restrain its officers from tearing up a sidewalk and replacing it with another of different width. The bill alleges that complainant was the owner of the lot in front of which the walk had been laid; that when it was constructed he had paid half of its cost; that by being repaired, at an expense of about $1 per rod, it would last four or five years, and that the cost of constructing the new one would be from $4.50 to $5 per rod; that the present walk is sufficient to accommodate all who travel over it. He alleges that the city officers, without any legal authority, have ordered the street commissioner to tear up the present walk and to construct a new one; that the act is illegal, and without authority of law, and that such a change will burthen the citizens with heavy and oppressive taxes. It alleges that the city has no right to tear up sidewalks, without necessity, for the purpose of imposing burthens as taxes and assessments by constructing new walks in their stead.

To this bill defendant filed a demurrer, and, on a hearing thereon, it was sustained by the court and the bill dismissed, from which complainant appeals to this court, and asks a reversal.

The bill fails to state that the city is even incorporated, nor does it refer to its charter, even if it is so organized. On the contrary, the bill does aver that the contemplated acts are illegal and unwarranted; and if this allegation be true, then we can see no reason why the writ of injunction should be abused by restraining the city from the performance of the contemplated acts. If that allegation is true, then the remedy at law is ample and complete; and in such cases a court of equity will not take jurisdiction, unless it be under special circumstances, none of which appear in this case.

All that the allegations of the bill amount to, is, that the city and its street commissioner are about to do an unlawful act, that will impose new burthens on appellant, or his property. If these acts are illegal and unwarranted, then any tax or assessment levied for its payment would be illegal and void, and the tax or assessment could not be enforced. The property owners could resist their payment at law.

Again, there is no allegation that the city, under its charter, has any right or authority to make an assessment on the property in front of which the walk is to be constructed, or that such levy is intended or will be imposed. The nearest approach to such an allegation is, that the construction of the sidewalk "is designed to be made a charge upon said property, in whole or in part, and thus impose heavy unnecessary burdens upon said property and upon said complainant." This allegation does not say that such burthens will be imposed or will necessarily follow such acts, but simply that such is the intention; and we have seen that if the other allegation is true, that the act would be illegal and unwarranted, then no legal tax or assessment could be imposed to pay for its construction.

If the city is incorporated, then the council probably have power to open, grade and repair the streets, and may, for aught we know, have ample discretionary power to do so, as to time, manner and cost; and if acting under the general

incorporation law, there is no lack of power. It is given by the seventh clause of section 62; but we are uninformed whether this city is acting under the general law or a special charter. If under the general law, then the power is general, and confers a large discretion in its exercise; and that power will not be controled by the courts, unless there is abuse operating oppressively upon individuals.

Again, the amount involved in this case is small, perhaps too small to confer jurisdiction on a court of equity. From the allegations of the bill, it seems that it would cost about $10 to repair the present walk and about $45 to build the new one, thus leaving a difference in expenditure of $35. Then it alleges that these acts are designed to burthen complainant with unnecessary taxes. This seems to be the burthen of the complaint, as it is repeated, in substance, several times in the bill. Now, his portion of a general tax on all of the property in the city, to pay for this improvement, would probably not exceed a few cents, and it would be absurd to hold that equity would take jurisdiction of such trifles.

But, even suppose that the expense would be imposed on the adjacent property holders, according to the benefits derived, can we judicially know that anything would be assessed against appellant's property? Or, if so, that it would be more than a mere nominal sum? Appellant has not ventured even to aver that it would.

On the facts set out in the bill, we are unable to see any grounds shown for granting the relief sought, conceding them all to be true. The remedy by injunction should not be extended in its operation to cases not falling within well recognized principles. The tendency seems to be to greatly abuse it as a remedy, by applying for the writ in a great variety of cases where its use is prohibited by well recognized principles, and to attempt its use rather for the obstruction than the advancement of justice.

Syllabus.

Where persons or officers are acting within well recognized powers, or exercising a discretionary power, a court of equity would be wholly unwarranted in interfering, unless the power or discretion was being manifestly abused to the oppression of the citizen; but if such wrong is being inflicted on appellant as he claims, then his remedy is complete at law, and he must be left to seek it in that forum.

The decree of the court below is affirmed.

Decree affirmed.

THOMAS CHALLENOR

v.

NATHANIEL NILES, Admr.

1. SCIRE FACIAS—*not an ordinary action.* A *scire facias* to revive a judgment is not a suit, within the meaning of the statute prohibiting a plaintiff from suing a defendant out of the county where the latter resides or may be found, but is a judicial writ, founded on a matter of record, and must be issued from the court in which the judgment was rendered.

2. JURISDICTION—*to send process out of county for service.* In *scire facias* to revive a judgment, or upon a matter of record, the court has jurisdiction to send its process to any county where the defendant may be found, and a plea in abatement, that the defendant does not reside, etc., in such county, is not sustainable.

3. AMENDMENT—*changing name of plaintiff.* A *scire facias*, by an administrator, to revive a judgment in favor of his intestate, is irregular, if brought in the name of the deceased; but, in such a case, it is proper to allow an amendment, by substituting the name of the administrator as plaintiff.

WRIT OF ERROR to the Circuit Court of Monroe county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. HAY & KNISPEL, for the plaintiff in error.

Mr. N. NILES, *pro se.*

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a proceeding, by writ of *scire facias*, to revive a judgment recovered in the circuit court of Monroe county, on the 14th day of April, 1858, by Mary Orben against Thos. Challenor.

The writ was issued by the clerk of the circuit court of Monroe county, on the 10th day of February, 1874, directed to the sheriff of St. Clair county, where service was had upon the defendant in the writ.

On the return day of the writ, the defendant appeared and filed a plea in abatement to the jurisdiction of the court, in which he averred that he resided and was served in a county other than that in which the writ issued. To this plea a demurrer was interposed, which the court sustained.

The decision of the court in sustaining the demurrer to the plea in abatement, is the alleged error mainly relied upon by appellant to secure a reversal of the judgment.

The second section of the Practice Act, revision of 1874, page 775, declares that: "It shall not be lawful for any plaintiff to sue any defendant out of the county where the latter resides or may be found, except in local actions, and except that, in every species of personal actions in law, when there is more than one defendant, the plaintiff commencing his action where either of them resides may have his writ issued, directed to any county where the other defendant may be found."

The appellant relies upon this statute to sustain him in the position that a writ issued in Monroe could not be legally served upon him in St. Clair county.

If this was to be regarded as an original action, then the position assumed would, no doubt, be correct; but a *scire facias* to revive a judgment is not the commencement of a suit, within the meaning of the statute which prohibits a plaintiff from suing a defendant out of the county where the defendant resides or may be found, but it is a judicial writ, founded on a matter of record.

We are aware of no practice that would authorize a writ of *scire facias* to issue to revive a judgment from a county other than that in which the judgment was rendered, and if the writ could not be sent for service to another county, in many cases the object of the writ would be defeated.

In the case of *Crisman* v. *The People*, 3 Gilman, 351, which was a *scire facias* issued upon a forfeited recognizance, which was a matter of record in Morgan county, but the writ was directed to and served by the sheriff of Scott county, the objection was made in that case, as in this, that the court could not issue process to another county; but the court said, there can be no doubt about the jurisdiction of the court. It had full power to send its process to any county in the State where the plaintiffs, or any of them, resided or might be found.

It is a universal rule that recognizances must be prosecuted in the court in which they are taken or acknowledged, or to which they are by law returned.

If, as was held in the case cited, a *scire facias* issued upon a recognizance could be sent to any county in the State for service, upon the same principle we fail to see any satisfactory reason why the same kind of process, the object of which is to revive a judgment, can not be directed and served in the same manner.

It is also insisted, that the *scire facias*, having been issued in the name of Mary C. Orben, she having previously died, was void.

It was irregular to issue the writ in the name of the deceased. The court, however, on motion, properly allowed an amendment, by which the name of the administrator of the estate of the deceased was substituted, and the cause proceeded to final judgment in the name of the substituted party.

It is also insisted, that the judgment rendered was not for a sum certain. While it may be true the judgment entered by the court may not be strictly accurate, yet it is not so defective as to justify a reversal.

The judgment will therefore be affirmed.

Judgment affirmed.

Syllabus.

JAMES J. BORDERS *et al.*

v.

WILLIAM K. MURPHY.

1. DECREE—*when not binding on party.* A person not made a party to a proceeding for partition, and who is not served with process, and who does not enter any appearance, is not bound by any decree rendered therein, and his interest or title in the premises will not be affected in the least.

2. To bind a party by judicial sentence, he must be made a party to the proceeding, and must have either actual or constructive notice thereof, or enter his appearance.

3. ATTACHMENT—*service or levy essential to jurisdiction.* In an attachment before a justice of the peace, where there is no personal service upon the defendant, or levy upon his property, and notice, as required by statute, the justice will have no jurisdiction to adjudicate and render judgment, and any judgment rendered will be a nullity.

4. REDEMPTION—*under void judgment confers no title.* Where a party redeemed land from a sale under an execution issued upon the transcript of a justice's judgment, in a case where the justice had no jurisdiction, and acquired a sheriff's deed on a sale under his execution, it was *held*, that the sale was a nullity, and passed no title whatever, but that the redemption money having been accepted, destroyed the prior sale and left the title to the land in the original owner.

5. LIMITATION—*must be pleaded, if relied on.* No rule of practice is more firmly settled, than that, to render the Statute of Limitations availing as a defense, it must be set up and relied on by the pleadings; and this rule applies equally in equity and at law.

6. SPECIFIC PERFORMANCE—*contract to convey land in consideration of acts done enhancing value of residue.* If the equitable owner of land agrees to convey an interest therein, subject to the approval of the holder of the legal title, to another, if the latter will build a depot and side track near the same, and such party does build the same, at his own expense, with the knowledge of the holder of the legal title, whereby the value of the tract is greatly enhanced, a court of equity will enforce the contract, subject to the rights of the holder of the legal title for any sum due him.

APPEAL from the Circuit Court of Perry county; the Hon AMOS WATTS, Judge, presiding.

Mr. EDWARD V. PIERCE, and Mr. E. B. RUSHING, for the appellants.

Mr. GEO. W. WALL, and Mr. LEWIS HAMMACH, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee filed his bill in the Perry circuit court, against appellants, for the partition of 80 acres of land, of which John Osborn, in 1854 or 1855, died seized. At his death, he left surviving him a widow, since deceased, and four children: William and Henry, his sons, and Martha and Mary J., his daughters. The latter married Archibald Beggs.

It is admitted that Samuel Montgomery is the owner of an undivided one-fourth of the entire tract; that Absalom and Moore H. Wilson own another one-fourth, in which their mother has dower. Appellee claims an undivided fourth, but his title is disputed; and appellee claims that Magill owns the remaining fourth, subject to the equitable title of appellee, of six and a half acres, and the incumbrance of an equitable mortgage, held by Borders.

It also appears that, in July, 1858, on a petition for partition, filed by Magill against all of the heirs of John Osborn, deceased, except William, a decree for partition was rendered, and a partition was made and subsequently approved. Prior to that time, the dower of the widow had been assigned, under a decree rendered in a proceeding had for the purpose, and although William was not, in any manner, a party to the decree of July, 1858, or the petition therein, it is urged that he is bound by that decree.

It is further insisted, that Wm. Osborn's interest was sold and conveyed, under execution sale and sheriff's deed, under an execution from the Perry circuit court. It appears that M. G. Maxwell, as administrator of John Osborn, deceased, recovered a judgment against Wm. Osborn and Wm. Gamble, for $219.75, and under an execution issued on that judgment

William's interest in this land was sold and bid off by the administrator; and after the expiration of twelve months thereafter, and within fifteen months, one Samuel Halliday commenced an attachment suit, before a justice of the peace, against Wm. Osborn, who had gone out of the State, but neither found property to levy upon nor procured service upon him, but the justice of the peace rendered judgment against him for $49. Halliday afterwards procured a transcript from the docket of the justice of the peace, and filed it in the office of the circuit clerk of Perry county, and sued out execution, and placed it in the hands of the sheriff; paid to him the requisite sum to redeem from Maxwell's sale; caused the land to be levied upon, and on a sale he became a purchaser, and received a certificate of purchase, and, no redemption having been made, he received a sheriff's deed. He afterwards sold to Archibald Beggs, who had married one of the daughters of John Osborn, deceased, who then held another fourth of the land. Halliday took back a mortgage of not only the interest he had sold to Beggs, but also the interest his wife held in the premises, to secure the purchase money. Subsequently Halliday foreclosed this mortgage, and purchased in the property at a master's sale, and received a certificate of purchase. This he assigned to J. J. Borders, who was acting for David Magill; and it appears that Borders was to give Magill time to repay him the money, with interest. Magill had paid, perhaps, about $50 towards the redemption, he having previously purchased of Beggs. Borders subsequently obtained a deed, under his purchase, from the master in chancery.

It appears that Magill was in possession of one-half of the premises not occupied by the widow of John Osborn, deceased, which had been assigned to her under decree. He also read in evidence tax receipts for the years from 1862 to 1870, inclusive, for the taxes on a part of the land, under his plea of the Statute of Limitations.

It likewise appears that, in May, 1871, Magill and wife entered into an agreement with appellee, that if he would erect a depot building in the town of Swanwick, which adjoined this land, and have a side track laid, and have the 26 acres on the south side of the south-west quarter of the north-west quarter of section 22, town. 4 south, range 4 west of the third principal meridian, laid off and platted into town lots, they would convey to him the undivided half of the undivided half of that tract of land. He built, at his own expense, the depot, at a cost of $1000, procured the side track to the railroad to be put in, and surveyed and made the town plat at his own expense, as agreed, but Magill refused to make the conveyance. Appellee, before filing his bill, purchased and received from Wm. Osborn a conveyance of all his interest in the 80 acres in controversy.

On a hearing, the court below found that appellee owned the interest of Wm. Osborn, and was entitled in equity to six and one-half acres of Magill's interest in the land; that Sam'l Montgomery owns an undivided one-fourth of the tract; that Absalom Wilson and Moore H. Wilson are each seized of an undivided one-eighth part, subject to the dower of their mother, Rose Ann Wilson; and that Magill is seized of an equitable title to one-fourth, subject to the claim of Borders for the money he has expended in purchasing the certificate of sale by the master in chancery, and of the equitable title to one-fourth of the 26 acres, under their agreement, which is also subject to Borders' equitable mortgage. The court ordered a partition of the premises according to the rights of the several parties, and the assignment of dower, and appointed commissioners to carry the decree into effect.

The commissioners made their report of the partition and assignment of dower made by them. Thereupon, appellants filed exceptions to the report, which being overruled, the report was confirmed. From these decrees defendant Borders appeals, and assigns error on the record.

The record shows that the bill was taken as confessed against Samuel Montgomery, Jane Osborn, the widow of John Osborn, deceased, and Rose Ann Wilson.

Was William Osborn barred or in anywise affected by the decree and proceedings in partition, had in October, 1854? There is no pretense that he was named in or made a party to that proceeding. He had no opportunity to be heard or have his rights determined. He was not called on to show whether he had rights or not, and, if so, what they were. It is a fundamental principle of justice, recognized and acted upon by all courts, that a party can not be deprived of or his rights be affected without having an opportunity to assert and defend them. Hence, to bind a party by judicial sentence, he must be made a party to the proceeding, and must be served with actual or constructive notice of the proceeding, or enter his appearance. It is believed no decision can be found of any respectable court, which announces a contrary doctrine. It would be repugnant to every principle of justice, and contrary to all of the adjudications of the past, to so hold. He, not being a party to that proceeding, is in no sense or manner bound by it, nor was his interest in this land in the slightest degree affected thereby; and he or his assigns are perfectly free to assert his title, at all times and in all places, as though the decree and partition had never been had.

The attachment proceeding by Halliday against him is governed by the same principle. There is no pretense that he was served in that proceeding. The judgment was rendered without authority and in violation of law. Had there been a levy on property, and notice given as required by the statute, then the justice would thereby have acquired jurisdiction over the property, so as to have authorized him to hear evidence to determine whether the plaintiff's claim was just, and, if he so found, render a judgment ordering the sale of such property. But to render a valid and binding personal judgment there must be service on the defendant, as required by the statute, or an appearance entered. There being no

such service or appearance, the judgment was wholly unauthorized and absolutely void, and under which no legal or binding act could be done or right acquired.

This judgment, then, being a nullity, Halliday had no legal right to file a transcript of it in the circuit court, nor had the clerk any legal right to issue an execution on it, nor could the sheriff legally execute it. The judgment being void, all proceedings based upon or had under it were equally void. This being true, Halliday could not legally redeem under it, nor could the sheriff execute it by levy and sale of the property of Wm. Osborn, and the purchase by Halliday was also void, as well as the deed he subsequently obtained from the sheriff. All these proceedings, including the rendition of the judgment, and the sheriff's deed, and all intermediate steps, were void, and conferred no rights on any one, nor did they affect the rights of Wm. Osborn or deprive him of any. They were as though they had never been performed.

Notwithstanding the execution, levy and sale were void, still, inasmuch as the purchaser received the redemption money, his act in thus receiving it operated to extinguish the sale and relieve the lands from the incumbrance of his sale and purchase. Had he, however, refused to receive the money, he could have compelled the sheriff to make him a deed for the land thus sold, notwithstanding the subsequent sale and the purchase by Halliday. See *Brown* v. *Parker*, 15 Ill. 307. This, then, left the title in Wm. Osborn as it was before any sale was had.

As there was some evidence introduced as to possession and payment of taxes by Magill under the deed he received from Beggs, we have turned to and examined with some care the transcript of the record; but that search has not enabled us to find that the bar of the statute was set up by plea, answer or otherwise. It is not to be found in either of the answers, or separately pleaded, so far as the record discloses, and as it is not set out or referred to in the abstract, we presume that no such defense was interposed by the pleadings.

There is no rule of practice more firmly settled and adhered to, than, to render the bar of the Statute of Limitations availing, it must be set up and relied upon by pleading. This is true both at law and in equity. As the statute was not so relied on in this case, it would be useless to discuss that question. In fact, appellant does not seem to urge it in argument, but simply refers to the evidence.

A careful examination of the evidence shows, we think, that Borders holds the title he acquired under the master's sale as a security for the money he advanced to procure the assignment of the certificate, and that the equitable title was in Magill only subject to the payment when he entered into the agreement with complainant; that he had, at that time, power to sell it, subject to that incumbrance. Hence the agreement was valid and binding.

Even if the contract could be held only binding on the approval of Borders, which we are unable to admit, still Magill was to see him and learn whether he approved it. He admits that he gave complainant no notice that Borders disapproved of the arrangement for about three months afterwards, and after complainant had built the depot, procured the construction of the side track, and platted the ground. To permit him and Borders to lie by whilst appellee was making such improvements, incurring large expense, and thus greatly enhancing the value of the land, and then allow them to reap all of the benefits, would be rank injustice, that no court should suffer, unless restrained by unswerving rules of law. We are clearly of opinion that they are estopped to rely upon this as a ground for holding the contract invalid, even if it could have been so held had timely notice been given, and, under the evidence, the court did right in finding it valid and binding.

We perceive no error in this record, and the decree of the court below must be affirmed.

Decree affirmed.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY

v.

CHARLES T. STRATTON.

1. NEGLIGENCE—*injury to child when person in charge of child is negligent.* The negligence of a parent or guardian having in charge a child of tender years will not excuse a carrier by rail from using all the means in its power to prevent injury to the child; yet if the negligence of the former is the proximate cause of the injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier can not be held responsible, unless it is shown to have omitted duties, the discharge of which would have averted the injury.

2. SAME—*passenger getting off train while in motion.* A passenger has no right to attempt to get off a train of cars when in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril, and he must bear the consequences, however disastrous.

3. Thus, where a father took passage, with his son, aged about ten years, upon a train of cars, being assured that the train would stop at a certain station, and when the whistle was sounded for such station, he and his son went out of the coach upon the platform, and stepped down on the steps, and, being burdened with luggage, stepped off the train before it had stopped, and the son was thrown upon the station platform, and from there fell under the wheels of the cars, where he received such an injury as to cause the loss of both legs, it was *held*, that no recovery could be had against the company.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

This was an action on the case, by the appellee, against the appellant, to recover damages for personal injuries alleged to have been caused by negligence on the part of the defendant. The opinion of the court gives a statement of the facts. The jury returned a verdict in favor of the plaintiff for $6000, upon which the court rendered judgment, overruling a motion by the defendant for a new trial.

Mr. H. P. BUXTON, for the appellant.

Mr. B. B. SMITH, and Messrs. CREWS & HAYNES, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

When plaintiff was injured, he was but ten years old. That was in 1863. He had just arrived from St. Louis. His father, in whose care he was while in the city, desired to leave for Salem by the evening express train on defendant's road. That train, it was known, did not usually stop at Salem. but on inquiry of the division superintendent, it was ascertained it would stop that night. Accordingly, he procured passage for himself and son. On their arrival at Salem, in attempting to leave the cars, plaintiff was in some way thrown or fell under the moving cars, and had both legs so badly crushed they had to be amputated. Soon after reaching his majority, plaintiff commenced this action to recover damages for the injuries sustained.

In the first count of the declaration, it is averred, as a ground of liability, that, plaintiff being a passenger from East St. Louis to Salem, defendant did not at the latter station slacken the speed of its train and stop a reasonable length of time to enable plaintiff to get off the cars without injury to his person; that defendant did not use due care in that regard, but, on arrival at Salem, slackened the speed of the train, thereby inviting plaintiff to leave the cars, and that, with the consent and persuasion of defendant, plaintiff did alight from the cars, but, by means of the rapid rate at which the train was moving, he was thrown violently upon the platform, and thence underneath the moving cars; and in the second count it is averred defendant did not at Salem stop its train a reasonable length of time to allow plaintiff to leave it with safety, but negligently and carelessly suddenly started the train in motion, whereby plaintiff was violently thrown underneath the moving cars, and was injured.

It is not claimed any recovery can be had on the first

count. The proof shows, and it is not now disputed, the train was stopped a reasonable time to permit all persons to get off with entire safety. A number of passengers, among them women and children, did get off at that station, ample opportunity being allowed for that purpose. There can be no pretense that branch of the case has been sustained by any testimony offered. The contest is as to the cause of action attempted to be set up in the second count, viz: whether defendant, although it may have stopped its train, suddenly started it up again with such violence, while plaintiff was in the act of getting off, as to throw him upon the platform, and from thence under the cars.

The jury found the issues for plaintiff, and the principal question is, whether the verdict can be maintained on the testimony.

It will not be necessary to remark on all the instructions given on behalf of plaintiff, further than to say many of them are faulty in the statements of legal principles applicable to the case. The case is by far too serious in its character, and too sad in its consequences, to be decided on any mere technical objections to instructions. We prefer to place our decision on the merits of the case alone. The injury plaintiff has sustained is irreparable, and, if a recovery can be had at all, the present judgment ought to be affirmed. No measure of damages can make full reparation. These considerations have induced a most careful and painstaking investigation of the case in all its phases. We have examined the record with that degree of care the importance of the case demands, and, however much we may be touched by the inexpressibly sad misfortune of plaintiff, we have been unable to discover, even under the most favorable view of the evidence, any tenable ground upon which to place an affirmance of the judgment in his favor.

Plaintiff was too young to exercise any great degree of care for his personal safety. He was largely controlled in his actions by his father, in whose care he had been traveling.

The arrangement for leaving St. Louis on the evening express train, that did not usually stop at Salem, was made by his father. Plaintiff had nothing to do with the selection of the train he was to go on. An accommodation was to leave on the same evening, but at a later hour, which it was known would stop at all the stations, for the convenience of passengers; but his father chose for them the express train, and plaintiff had no choice in the matter.

Conceding it to be a correct principle, the negligence of the parent or other guardian having in charge a child of tender years would not excuse the carrier from using all the means in its power to prevent the injury, still if the negligence of the former was the proximate cause of injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier upon no just principle can be held responsible. It is not the negligence of defendant, but of the party having the control of the child, and if any liability attaches to either party, it must be to the latter. Nevertheless, it is the duty of defendant to make it appear it was by no omission of duty on its part the accident occurred, and that the timely discharge of all duties imposed by law, and the provident care for the safety of passengers, would not have averted the danger. This brings us to consider whether defendant in the case at bar has been guilty of any negligence that tended to produce the injury to plaintiff, even under the strictest rule of liability the law imposes.

There is but little conflict in the evidence as to the principal facts—not more than often occurs in the accounts given by different persons of any casualty witnessed by them. Both parties agree plaintiff's father was assured by Mr. Hinckly, the division superintendent, the express train would stop at Salem that night, and that this assurance was given before he engaged passage for himself and son. At Odin, a number of passengers were taken on for Salem, under a like assurance from the superintendent the train would stop at that station. This latter fact must have been known to plaintiff's father, as

the superintendent was in the same coach with him, and it seems hardly possible he did not hear the inquiries on that subject. It was about dark, or perhaps a little after, when the train reached Salem. As the train was being checked up, passengers for that station began to prepare to leave the cars, when Hinckly, in a voice loud enough to be heard, and was heard by many, said to them, "Don't get off till the cars stop!" Plaintiff and his father both deny they heard this announcement.

In his testimony, plaintiff's father gives this account of the accident that befell his son: When the whistle sounded for Salem station, he and his son went out upon the platform of the car. As the train approached the station, they went down on the steps of the car, to be ready to step off as soon as the train should stop. Plaintiff was on the lower step, and witness on the one next above, holding plaintiff by the hand. Both of them carried some luggage. Witness remembers saying to his son, not to get off until the train stopped. When the car came to the platform of the station, plaintiff was about to leave the car, and the witness adds, as to the cause of the accident, the train seemed to stop just as his son stepped off, and then suddenly started forward again, by a violent movement, which threw him upon the platform, and his son under the wheels of the cars. Substantially the same account of the immediate cause of the accident is given by plaintiff. No doubt they believed, and do yet believe, the train had come to a halt when plaintiff stepped from the cars, but in this they must have misjudged, being misled, in all probability, by the darkness of the hour. The violence of the accident corroborates this theory of the case. Witness says he was thrown a complete somersault upon the platform of the station at the same time his son was thrown under the wheels of the cars. This result could not have been produced unless the train had been in rapid motion. Manifestly, they were mistaken as to its speed, or else they would never have taken the fatal step. Other passengers who got off at that station all unite in saying the train was stopped

in the usual way, and they noticed no unusual motion. No one of all the witnesses sworn, except plaintiff and his father, observed the fact testified to by them, that the train was first stopped, and then suddenly started with great violence. The witness Andrews says that he, and his mother, then 58 years old, were standing up in the car, waiting for the train to stop, but experienced no sudden jerk or shock. A woman, with an infant in her arms, was also standing up in the car, but observed no unusual or violent motion. All other passengers for Salem got off, when the train stopped, without difficulty, plenty of time being given for that purpose. No reason is shown, in all this evidence, why plaintiff and his father could not have done the same thing, had they observed due care for their personal safety.

By their voluntary choice they selected a most dangerous place, on the steps of the car, while the train was yet in motion. Both were incumbered with baggage, which would effectually prevent them from holding on to anything to secure their safety. The position occupied was dangerous, and was taken without due care. Whether the accident was produced by any sudden, violent movement of the cars, caused by putting on or letting off brakes in the ordinary management of the train, or whether they were induced to step off, under the belief the train had come to a halt, when it had not, it must be attributed to their own omission to observe the usual precautions, rather than to any negligence on the part of defendant. It may have been the impression of plaintiff's father, the train would stop at that station but a short time, and that it would be necessary to get off very quick. But this belief, however induced, could not justify him in exposing himself and son to such great hazards. He had been assured by officers in charge of the train, it would stop to let off passengers, and he ought to have relied on that assurance. Had he remained in his seat, he could have heard the announcement, which was distinctly heard by others: "Don't get off till the cars stop!" which would have put him on his guard.

Defendant had undertaken to stop its train at Salem, to let passengers get off, and any violation of that agreement would have subjected it to damages. A passenger has no right to attempt to get off a train when in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril, and he must bear the consequences, however disastrous. *Illinois Central Railroad Company* v. *Slatton*, 54 Ill. 133; *Chicago and Alton Railroad Company* v. *Randolph*, 53 Ill. 510.

The verdict, in our opinion, is against both the law and the evidence, and the judgment must be reversed.

Judgment reversed.

JAMES W. PRIMMER

v.

JOHN CLABAUGH.

1. WITNESS—*widow a competent witness to protect her separate property.* Where the litigation involves the separate property of the wife, she is made a competent witness to protect the same, and the fact that her husband is dead, will not render her incompetent as a witness against his administrator, when her property is replevied in a suit by a party claiming under her, against the administrator of her husband's estate.

2. MARRIED WOMEN—*use of her property by husband.* The fact that a married woman allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests, and the proper enjoyment of it by both, will not make it liable for his debts, or entitle his administrator to claim the same as against her mortgagee.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. W. W. WILLARD, and Mr. B. B. SMITH, for the appellant.

Mr. A. H. WHITE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was replevin in the *cepit* and *detinet*, brought to the Marion circuit court by John Clabaugh against James W. Primmer, for a lot of mules, cattle, farming implements and other like personal property.

The pleas were, *non cepit* and *non detinet*, and a special plea that the property was the proper goods and chattels of one John J. Dolson, deceased, on whose estate defendant had administered, and claiming to hold the property as such administrator.

On issues being made up, the cause, by consent of parties, was referred to Michael Schæffer, Esq., under the first section of Ch. 117, R. S. 1874, title, "Referees," who reported the evidence and his conclusions thereon, to which exceptions were taken by the defendant, and the same argued, and considered by the court. The exceptions were disallowed, and a judgment rendered according to the finding and suggestions of the referee.

From this judgment the defendant appeals.

The plaintiff claimed the possession of the property in question, in virtue of two chattel mortgages executed by Emily H. Dolson, the wife of the intestate, one to Alexander Cameron, and by him assigned to the plaintiff; the other executed to the plaintiff himself, to secure certain notes executed by Mrs. Dolson to the parties respectively.

The first objection made by appellant is, that Mrs. Dolson was not a competent witness for the plaintiff, under section 5 of Ch. 51, title, "Evidence and Depositions," R. S. 1874.

We have no doubt the wife was a competent witness, and made so by the section to which reference is made, "the litigation involving the separate property of the wife." Was her husband living, it is certain she could be a witness to protect her own separate property rights. His death can not place her in a worse position, and should not. Dead or alive, the wife or widow can vindicate her right to her separate

property, before any tribunal in this State. It would be gross injustice to declare that the rights of a married woman are lost by the death of her husband.

The wife being a competent witness, there could be no hesitation on the part of the referee or the court in finding as they did, for it is clear, from her testimony, the money by which the most of this property was acquired was her money, and it matters not what the law of Iowa or New York may be in this respect, it was recognized by the husband, on their removal to this State, as hers, as will be seen by his letter to plaintiff, set ont in the record bearing date December 14, 1872.

The principles approved by this court in *Dean* v. *Bailey*, 50 Ill. 481, govern this case. It was there said, it does not follow, because a wife merely allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests, and the proper enjoyment of it by both, that it should become liable to the payment of his debts.

Such property does not go to the administrator, but to the wife, or her personal representative.

Seeing no error in the record, we therefore affirm the judgment.

Judgment affirmed.

THE CHICAGO AND ALTON RAILROAD COMPANY

v.

IRWIN Z. SMITH.

1. RIGHT OF WAY—*when statute requires notice to owner, one to holder of life estate, then deceased, not good as to remainder-man.* Where the charter of a railway company required notice, by publication, to the owner or occupier, or unknown owners of land sought to be condemned, of the application to appoint commissioners, and the company publishes such notice as to one who had held a life estate only, but who was dead, not

naming the remainder-man, it was *held*, that the subsequent proceedings condemning the land for right of way were not binding upon the remainder-man, and that he might recover the land appropriated, by ejectment.

2. SAME—*when notice must designate owner.* A charter of a railway company authorizing the condemnation of land for right of way, upon giving notice by publication for thirty days, "to the owners or occupiers, or unknown owners, as the case may be, of the intention" to apply for the appointment of commissioners, etc., requires that the notice shall be given specifically to the owner or occupier, if known,—if not, to unknown owners by that designation. A general notice, in such case, will not be sufficient.

3. NOTICE—*how to be given.* Where a notice is required by statute, and the mode of service is not specified, it must be personal; and usually, when notice is required by publication, it must be directed to the person, by name, who is required to be notified.

4. SAME—*to deprive a party of rights.* It is a rule of general application, that a party can not be deprived of his rights without having notice and an opportunity to be heard. When the proceeding is summary, and the notice only constructive, the courts will never abridge the right to notice, or substitute another for it.

5. RIGHT OF WAY—*statute must be strictly observed.* A proceeding to condemn land for right of way being an extraordinary and summary remedy, the party exercising the power must strictly observe all the requirements of the statute under which he acts.

6. EJECTMENT—*demand when not required.* Where a condemnation of land by a railway company is void for want of a proper notice, or defect in the proceedings, and the company has notice that the owner claims the same, and of the grounds of his claim, and finally informs him he will have to sue if he gets anything, even if a demand were necessary, this will obviate the necessity of any formal demand before bringing ejectment.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was an action of ejectment, by Irwin Z. Smith against the Chicago and Alton Railroad Company, to recover certain real estate occupied by the defendant as a right of way. The opinion of the court states the facts of the case sufficiently to an understanding of the points decided.

Mr. WM. J. TEWKESBURY, for the appellant.

Messrs. GILLESPIE & SMITH, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This case was previously before this court, and is reported in 67 Ill. 191. It was there held, that the action of ejectment for the recovery of this land could be maintained. It was also held, that appellee had shown a title in fee, and he produced and read in evidence, on the trial in the court below, the same title.

On the trial in the court below, appellant introduced the publisher of the newspaper in which the notice was published, and he testified to its publication as required by the statute, and it is contended that, from it and the subsequent proceedings of the commissioners, the title of not only Matthew Kerr, but of those holding in remainder, was vested in the railroad company. As Matthew Kerr died in 1857, and his life estate thereby terminated, it is wholly unimportant to inquire whether the company acquired his title or not, as in this proceeding it can have no effect.

The controlling question in the case is, whether the notice of the intended application to the Governor for the appointment of three commissioners to appraise the land was such as to operate upon or bind those holding the remainder in fee. The notice is alone to Matthew Kerr. Elizabeth Kerr and Mary K. Knox are not named in it. The notice names Matthew Kerr as the owner of this land and another tract. Some of the tracts described are stated to belong to unknown persons, and some to heirs. But it is now insisted that the charter did not require the owner to be named in the notice, and that naming Kerr was unnecessary and an useless act, which in nowise affected the sufficiency of the notice to third persons not named therein. The requirement of the charter under which this notice was given, is this: "Notice by publication in some newspaper in St. Clair county shall be first given for thirty days to the owners or occupiers, or unknown owners, as the case may be, of the intention on the part of the

said corporation to apply to the Governor for the appointment of commissioners, as herein provided," etc.

A fair and reasonable construction of this provision manifestly requires that the notice shall be given specifically to the owner or occupier, if known. If not, then to unknown owners by that designation. Had a general notice, naming no person, been intended, very different language would have been employed. It would have been to all persons having an interest, or all persons desiring to contest the proceeding, or other general terms. But here there are three classes of persons named who must be notified. First, owners; second, occupiers; and third, unknown owners. The persons occupying the land could be known by going on the premises and making inquiry. That was easy and simple, and none could be misled. The owners could generally be ascertained by examining the record of deeds for the land. But if, on inquiry, it was found that the last grantee of record was dead, and the names of his heirs were unknown, and could not be learned, then they could have been described as unknown owners. This was manifestly the intention of the law-makers in adopting this statute.

When a notice is required, and the mode of service is not specified, the law requires that it shall be personal. And usually, when the notice is required by publication, it must be directed to the person by name who is required to be notified. Such has uniformly been the construction placed upon the Chancery Act, the Attachment Act, and proceedings of that character. The Statute of Wills, R. S. 1845, sec. 103, provides that, on an application for the sale of real estate, all persons interested in the real estate proposed to be sold, shall be notified to appear, and show cause why it should not be sold. Under that section, owing to the general terms of the law, it was held, that the notice need not specifically name any person. But that was based on the phraseology of that statute.

It is a rule of general application, that a party can not be

deprived of his rights without having notice and an opportunity to be heard. And when the proceeding is summary, and the notice is only constructive, courts will never abridge the right to notice, or substitute something else in the place of that required by the statute. Again, the person acting for, and who was president of the company, gave the construction to the law that the notice must name the owner, as that was the mode adopted. And this seems to us to be the natural and obvious meaning of the law.

Nor was there any hardship in requiring the company to learn the names of the owners of the lands they desire to condemn. They had but to examine the record of deeds to have possessed themselves of the requisite information. They could have done so with but little effort, trouble or loss of time. Whilst all persons at that day were desirous to see railroads constructed, it was not intended that it should be done at the sacrifice of all private rights. Those acting for the company knew, or should have known, that, in acquiring their right of way, they were pursuing an extraordinary and summary remedy, and, in doing so, the law imperatively demanded that they should observe all of the requirements of the statute under which they were acting. And this is a requirement that lies at the foundation of our system of jurisprudence. It is elementary, and familiar to all.

The requisite notice to the grantors of appellee was not given, and their title was therefore unaffected by the proceedings to condemn this land. The requirements of the statute were not observed, and their title could not be affected otherwise, unless by their consent.

It is said that the action could not be brought until a notice to quit was first given. Appellee had called the attention of the superintendent and attorney of the road to his claim, long before he brought his suit, and had a long correspondence on the subject. He fully and unequivocally stated his claim to them, and they asked for and received time to investigate the nature of his claim. He had been

negotiating and endeavoring to settle with the various companies for many years. They, he says, never denied his title, and finally, appellant's attorney almost defiantly told him to sue, if he desired.

What is the object of a demand of possession, in this class of cases? It is, that the tenant who has come in under the life estate, may know that his estate has terminated by the death of his landlord, and that he may learn to whom to surrender the premises. Of all this, appellant was notified for years before suit was brought. Not only so, but its attorney informed appellee that he could only obtain his rights, if he had any, by suit. If this was not a sufficient demand, it would be hard to conceive what would be more effectual. One more formal might, it is true, have been given, but surely not better or more effectual in substance.

We perceive no error in this record, and the judgment of the court below is affirmed.

Judgment affirmed.

HENRY SPRING *et al.*

v.

THE COLLECTOR OF THE CITY OF OLNEY.

1. TAXATION *by municipal corporations.* The act of April 15, 1873, authorizing incorporated cities to levy taxes annually, not exceeding three per cent, applies as well to cities incorporated under special charters as to those incorporated under the general act of 1872.

2. The act of April 15, 1873, relating to taxation by cities, is not an act amendatory of the general act of 1872 for the incorporation of cities and villages, but is an independent act, applicable to all incorporated cities, whether under the general law or under special charters.

3. The proviso to the fifth clause of the first section of the act of April 15, 1873, that "no tax shall be levied under this *section* unless two-thirds of all the aldermen elected shall vote in favor of the same," does not apply to the whole section, but only to the tax mentioned in such clause.

4. The power to levy taxes by a city "for general and contingent expenses, or any other expenses not herein otherwise provided for" is sufficiently broad to authorize the levy of a tax thereunder to pay ordinary debts.

5. STATUTE—*proviso, how construed.* A proviso in a statute is construed as affecting the paragraph to which it is annexed only, and not to the whole section or act, unless the collocation of the words shows a different intention.

6. INJUNCTION—*reasonableness of solicitor's fee on dissolution.* Where a temporary injunction is dissolved and the bill dismissed on motion, the case involving simply the construction of a statute, the allowance of $200 for solicitor's fees, in the assessment of damages, will be regarded as too large.

7. CHANCERY—*preserving evidence on assessment of damages on dissolving injunction.* If the evidence heard upon the assessment of damages, upon dissolution of an injunction, is not preserved in the record, the decree will be reversed. It is not sufficient for the decree to recite that evidence was heard, without showing what facts were proved.

APPEAL from the Circuit Court of Richland county; the Hon. JAMES C. ALLEN, Judge, presiding.

Messrs. CANBY & EKEY, for the appellants.

Messrs. WILSON & HUTCHINSON, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill for an injunction to restrain the collector of the city of Olney from collecting the municipal tax of one per cent levied and assessed against the complainants for the year 1874, on the ground that such levy is without authority of law.

The court below, on motion, dissolved the preliminary injunction which had been granted, and dismissed the bill, and assessed defendant's damages at $200, and complainants bring this appeal to reverse the decree.

The principal question presented is, whether the act of April 15, 1873, "in regard to the assessment of property, and the levy and collection of taxes by incorporated cities in this

State" (R. S. 1874, p. 254), is applicable to, and in force in, cities incorporated *by special acts* of the legislature.

The city of Olney was incorporated by special act in 1867, the act conferring upon the city council authority to levy a tax, for city purposes, not exceeding one-half of one per cent per annum. The city council levied a tax of one per cent, for municipal purposes, in the year 1874, and this is the tax sought to be enjoined. It is insisted that the limitation imposed, by the special charter of 1867, to a levy of only one-half of one per cent, must control, and that the levy of a tax of one per cent was in excess of the authority of the common council.

The act of April 15, 1873, is a general statute. It is by the first section enacted, "that, in all incorporated cities in this State, the city council may, by ordinance, annually levy and collect city taxes on real and personal property within the city, first, for," etc. (proceeding to enumerate seven specified purposes). The ninth section limits the levy for any one year to three per cent. This act draws no distinction between cities incorporated under a general law and those incorporated by a special act of the legislature; and contains no indication of any purpose to confine its operation to any particular class of cities, or reason for so confining it, or that it was framed with reference to any one class more than to another. The enactment is in respect to "*all* incorporated cities in this State," and we do not see why the language employed should not be allowed to have its plain and natural meaning, and be held to mean what it says, and to include all such cities, and not be restricted to a part only of them.

It is much dwelt upon by appellants' counsel, that, as the act of April 15, 1873, does not expressly repeal the provision of the charter of the city of Olney, which restricts the power to levy a tax to one-half of one per cent, the repeal thereof can only be by implication; that the law does not favor a repeal by implication, and that it is a principle that statutes of a general nature do not repeal, by implication, charters

and special acts passed for the benefit of particular municipalities, citing, in support thereof, Dillon on Mun. Corp., sec. 54, *State* v. *Stoll*, 17 Wall. 425, *The President and Trustees, etc.* v. *The County of La Salle*, 12 Ill. 339, and other like authorities; and reference is made to provisions in the special city charters of a large number of cities in the State restricting the limit of taxation to one per cent and one-half of one per cent, and it is insisted that the legislature could not have intended, by the general statute of April 15, 1873, to repeal all these restrictive provisions in these numerous special charters, and enlarge their power to tax to three per cent, and that it is inadmissible to hold them to be repealed by implication.

The general principle, that the provisions of a special charter, or special authority derived from the legislature, are not affected by general legislation on the subject, applies, in this State, in respect to city charters, with a diminished force, since the adoption of the constitution of 1870. Art. 4, sec. 22, of that constitution, prohibits the General Assembly from incorporating cities, towns or villages, or changing or amending the charter of any town, city or village, except by a *general law*. Suppose, in the case of any one of the many cities referred to by counsel, where the limit of taxation is fixed by their special charters at one-half of one per cent, that this restricted power of taxing, which might have sufficed for the limited needs of the municipality in its beginning, had become inadequate for the enlarged necessities of its subsequent growth, and an increased power of taxation was required. The change in its charter for that purpose could only be made by a *general* law; so that the principle relied upon fails in its application here, in its full extent.

As the legislature, in 1872, passed a general law to provide for the incorporation of cities and villages, it is supposed by appellants' counsel that the act of April 15, 1873, must have been designed to supply defects in such general law passed in 1872, and to be amendatory thereof, and so

applies only to that class of cities that have become incorporated under the law of 1872.

But such supposition seems to be entirely gratuitous. The general law of 1872 appears to have contained ample provision for the levy and collection of taxes. The law of April 15, 1873, is, in form and terms, an independent act, and, as an amendment of the law of 1872, would not be in conformity with Art. 4, sec. 13, of the constitution regulating the mode of amending a law.

But if the statute of April 15, 1873, be held to repeal, by implication, so much of the charter of the city of Olney as restricts the power to levy taxes to one-half of one per cent, the point is then made, that no tax can be levied unless two-thirds of the aldermen shall vote in favor of the same, which was not the case here. As before remarked, the first section of the act provides that the city council may levy and collect taxes, following with an enumeration, in numerical order, under seven distinct heads, of seven distinct purposes or classes of objects, for which taxes may be levied and collected, one of which is as follows:

"*Fifth*—To provide for a sinking fund or funds, for the payment of the general or special indebtedness of the city," etc., ending with this proviso: "*Provided*, that no tax shall be levied under this section unless two-thirds of all the aldermen elected shall vote in favor of the same."

The point is raised upon the use of the word *section* in this proviso, it being contended that the construction must be according to the letter, that the qualification of the proviso extends to the whole section, to all of the seven subdivisions into which it is divided, and is not to be confined to the fifth one alone. We think otherwise; that the collocation of the proviso sufficiently denotes the meaning that it should qualify the taxing power only under the fifth subdivision of the section, which was, "to provide for a sinking fund or funds," etc. Provisos are construed as affecting the paragraph to which they are annexed, and we are of opinion the one in

question should be so construed here—to apply, not to the whole section, but only to the fifth paragraph to which it is annexed.

For the extraordinary purpose of raising money for a sinking fund, a two-thirds vote of all the aldermen elected might well be required for levying the tax, while for the levy of taxes for ordinary purposes, no good reason is perceived for requiring more than the usual majority vote. To apply the unusual requirement of a two-thirds vote of all the aldermen elected to the levying of ordinary taxes, the intention to do so should appear clear. Had the intention been that it should apply to the whole section, it is believed that intention would have been unmistakably expressed, and that the requirement in this proviso would have been placed in a different part of the section, so as to denote its application to the whole section, and that it would not have been placed where it is, so as to indicate it to be a qualification to the fifth subdivision only of the section.

The further point is made, that the ordinance for the tax in question levied sixty cents on the $100 to pay debts; that the only provision for levying a tax to "pay debts" is in this fifth subdivision, and that, at least as respects this part of sixty cents on the $100 of the tax, there should have been a vote for it of two-thirds of all the aldermen elected.

But this fifth subdivision does not relate to levying taxes to pay debts, but only to provide for a sinking fund for the payment of the general or special indebtedness of the city. The general language of the first subdivision of the section, "for general and contingent expenses, or any other expenses not herein otherwise provided for," would cover the levy of the tax to pay debts.

The court below, upon the dissolution of the injunction, assessed and decreed against the complainants the sum of $200 damages for solicitor's fees, and this is assigned as error. This seems to us quite too large an allowance to be made here for the service of presenting to the court, on a motion

to dissolve the injunction, the simple question of the construction of this statute; besides, the evidence upon which the allowance was made was not preserved in the record, without which, as this court has frequently ruled, the decree can not be supported; and the recital here in the decree, that the finding of the court was on evidence heard, without showing what facts were proved, was insufficient in this respect, as held in *Albright* v. *Smith*, 68 Ill. 181. See *Goodwillie* v. *Millimann*, 56 id. 525; *Hamilton* v. *Stewart*, 59 id. 331.

The decree of the circuit court dissolving the injunction and dismissing the bill is affirmed, and that part of the decree assessing damages against the appellants is reversed, and the cause remanded.

Decree modified.

WILLIAM WINKELMAN

v.

JOSEPH G. CHOTEAU *et al.*

1. FAILURE OF CONSIDERATION. Where A executed his promissory note, payable to B, and delivered it to C, for the purpose of having it discounted, and C delivered the same to B, but B paid nothing for it: *Held*, that there was a failure of consideration, and that B could not recover in a suit on the note against A.

2. And the fact that A was indebted to B at the time of giving the note to him, and that B told C to collect the note and give the firm of which B was a member credit for it, will not entitle C to recover on the same, where it appears that the note was not given on account of the indebtedness of A to B.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. WILLIAM WINKELMAN, *pro se.*

Messrs. G. & G. A. KŒRNER, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was assumpsit, by appellees against appellant, on the following promissory note, under seal:

"Nine months after date, I promise to pay Chouteau & Edwards, or order, the sum of three hundred dollars, with ten per cent interest from date till paid, for value received.

This 29th day of March, 1860.

WILLIAM WINKELMAN, [L. S.]
ELIZABETH WINKELMAN, [L. S.]"

Among other pleas filed by appellant, is the following:

"And for further plea in this behalf, the defendant says *actio non*, because, he says, that the several causes of action in the several counts of declaration are for one and the same thing, to-wit: the promissory note in the first count of said declaration, and for no other cause whatever. Defendant further avers that said note was entered into and executed by defendant without a good or valuable consideration received by this defendant, or otherwise; that said note was executed by this defendant, not to secure any debt due and owing from this defendant or otherwise, but was executed wholly and solely for the purpose of then and there borrowing from said plaintiffs the sum of three hundred dollars, which this defendant never received *or otherwise been* advanced by said plaintiff said sum of three hundred dollars, or any part thereof, although defendant has, after the execution of said note, often requested said plaintiffs to advance to this defendant the sum of money last aforesaid; but said plaintiffs have wholly failed to so advance the said sum of three hundred dollars, or otherwise; wherefore defendant says, that the consideration of said note has wholly failed, and this defendant is ready to verify, wherefore he prays judgment," etc.

Replication was filed to this plea, traversing the facts pleaded, upon which issue was joined.

It is unnecessary to notice the issues on the other pleas.

On the trial, appellant testified that he executed the note for the sole purpose of having it discounted and obtaining a loan of money thereon from the plaintiffs; that he left it with one Herbert, to be used for that purpose; that he never authorized him to use it for any other purpose; that he never received anything thereon, and that he was not indebted to the appellees.

One of the appellees, James C. Edwards, testified that the note was presented to him, by Herbert, a few days after its date, with a request that he would have it discounted; that he took the note and tried to get it discounted, but was unable to do so; that, two or three days after that, Herbert came to him with a gentleman represented to be the appellant; that he informed them he had failed to get the note discounted, but that he would try it again; that about half an hour after Herbert and the gentleman with him left, Herbert returned again, and told witness to put the note away and collect it if he could, and give the firm of which Herbert was a member credit therefor.

It appears that appellant was indebted to Herbert when the note was given, but he positively denies that this note was given on account of that indebtedness, and appellees do not pretend he ever owed them anything.

Appellees do not occupy the position of assignees in good faith, without notice; they are simply payees, and if the evidence in the record can be trusted, there was a failure of the consideration for which the note was executed.

We think the defense set up in the plea is proved, and the judgment must, accordingly, be reversed, and the cause remanded.

Judgment reversed.

WILLIAM MALLOCK

v.

WILLIAM H. KROME.

CONSOLIDATION—*of demands in suit before justice of the peace.* If a plaintiff has a demand for a reward offered, and the defendant gives his note for $66.66, part of the same, and the plaintiff sues for the balance of the reward without including his note, and recovers only $33.33, this will be a bar to any subsequent suit upon the note.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. DALE & BURNETT, for the appellant.

Messrs. W. F. L. HADLEY, and Mr. JOHN G. IRWIN, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The only question presented by this record is in regard to the proper construction of sec. 49, chapter 79, Revised Statutes of 1874, which reads as follows: "In all suits which shall be commenced before a justice of the peace, each party shall bring forward all his demands against the other, existing at the time of the commencement of the suit, which are of such a nature as to be consolidated, and which do not exceed $200 when consolidated into one action or defense, and in refusing or neglecting to do so shall forever be barred from suing therefor."

It appears, from the record, that McDonald & Brown claimed a reward of appellant, Mallock, of $200, for finding two horses which had been stolen from him. Mallock gave McDonald & Brown his note for $66.66 in part payment of the reward. After the note was due, McDonald & Brown sued Mallock before a justice of the peace to recover that portion of the reward not embraced in the note, and recovered

a judgment for $133. An appeal was taken to the circuit court, where a trial was had, resulting in a judgment for $33.33.

McDonald & Brown had in their possession the note at the time the cause was tried before the justice and in the circuit court, but they did not offer it in evidence.

After judgment in the circuit court, the note was assigned to appellee, and this suit was instituted by him to recover the amount of the note. The circuit court rendered judgment for the amount of the note, to reverse which this appeal is brought.

It is insisted by appellee, that the case of *Buckner* v. *Thompson*, 11 Ill. 563, is conclusive of the question involved in this case. There is, however, in our judgment, a clear distinction between that case and the one before us.

In the case cited, Thompson commenced two suits against Buckner before a justice of the peace upon two notes, the *amount of which*, when *consolidated*, exceeded $100. It appeared, upon trial, that the defendant had a set-off, which was applied in the first suit, to a greater amount than the note upon which suit was brought. It was, therefore, insisted that the first suit was a bar to the second. The circuit court decided otherwise, and the decision, on appeal, was affirmed. The decision was, however, based upon the ground that the two demands, when consolidated, exceeded the jurisdiction of the justice of the peace.

It is there said: "The demands in these two suits, when consolidated, did exceed $100." And in the concluding part of the opinion the court further said: "Where a controversy exists as to the amount of a set-off to which a party is entitled, it would be too strict a rule to say, and the statute does not require, that the plaintiff shall, at his peril, give credit before the commencement of a suit for the exact amount to which the result of a trial may show the party was entitled."

If the amount of the claim which McDonald & Brown held against appellee, when added to the note, would have exceeded

$200, then, under the statute, they would not have been required to consolidate the two; but both note and account did not exceed $200. The two, when consolidated, were within the jurisdiction of the justice.

The statute is plain, that all demands of a nature to be consolidated, and which, when consolidated, do not exceed the jurisdiction of the justice, must be brought forward, or otherwise they will be barred.

The note and account were of a nature to be consolidated, and they did not exceed the jurisdiction of the justice. It then follows, that, when McDonald & Brown submitted to a trial, with the note in their possession, and neglected or failed to bring it forward, they or their assignee are concluded, and can not afterwards recover upon the note.

The statute was, no doubt, enacted to prevent a multiplicity of suits. Its provisions are just, and we see no reason why it should not be enforced.

The judgment will therefore be reversed, and the cause remanded.

Judgment reversed.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY

v.

GEORGE W. F. SMITH.

NEGLIGENCE—*in railway company in permitting weeds to grow on its right of way, so as to obstruct view of highway crossing.* It is negligence in a railway company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing, and if injury results to stock at such crossing, that might have been avoided but for such obstruction, the company will be liable.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was an action on the case, by the appellee, against the appellant, to recover damages for the killing of plaintiff's mule, by a train of cars, at a public road crossing.

The declaration contains three counts, the first of which charges that the injury was caused by a neglect to ring a bell or sound a whistle within eighty rods of the crossing, as required by law. The second alleges that the defendant allowed weeds and vegetation to grow on its track and right of way, at the place where the injury occurred, to such a height and density that defendant's servants could not operate and use its locomotive and trains of cars with safety to person and property, and that, in consequence of its negligence in this respect, the plaintiff's mule was killed. The third count avers generally that plaintiff's mule was killed in consequence of the negligence of the defendant in running its train.

The defendant filed the general issue, and a trial was had, resulting in a verdict and judgment in favor of the plaintiff for the value of the mule. The opinion of the court states the facts of the case sufficiently.

Mr. F. W. BURNETT, for the appellant.

Messrs. METCALF & BRADSHAW, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This action was brought to recover the value of a mule killed by a locomotive on appellant's road. No questions of law arise upon the record.

The mule had just escaped from the owner's inclosure, and was about to pass over the track, when it was struck by the engine, and killed. It was upon a crossing over a highway. At that point, the railroad makes a curve, and, on account of weeds which the company had suffered to grow upon its right of way, the view was so obstructed the mule could not

be seen, and was not seen, by the engine-driver or fireman, approaching the track. Had it been seen in time, it may be it would have been practicable to have stopped the train, or at least to have slackened the speed, so as to have avoided the accident.

It was negligence in the company to permit or suffer weeds, or anything else, to grow upon its right of way to such a height as would materially obstruct the view of the highway. The safety of persons and property alike make it necessary the company should keep its right of way free from obstructions, so that persons approaching the crossing may readily ascertain whether there is danger, and the employees in charge may be enabled to discover whether there is anything on the track.

The evidence is so conflicting, we can not say the jury were not justified in finding no bell was rung or whistle was sounded for the requisite distance before reaching the crossing. In this regard, the employees of the railroad company may have been guilty of negligence that contributed to produce the injury to plaintiff's property.

On a full consideration of all the evidence, we do not feel authorized to say the jury found incorrectly. Only questions of fact were involved, and no satisfactory reason is shown for setting aside the finding of the jury. The case was fairly submitted, and the verdict must be permitted to stand.

The judgment will be affirmed.

Judgment affirmed.

THE CITY OF COLLINSVILLE
v.
JAMES COLE.

ORDINANCE—*licensing hackmen, teamsters, etc.* An ordinance that "there shall be levied upon every hackman, drayman, omnibus driver, carter, teamster, cabman or expressman, and all others pursuing a like occupa-

tion, the sum of ten dollars for a license," was *held* not to embrace a farmer driving his team through the city. The purpose and object of such an ordinance is to impose a tax upon a business, calling or occupation, and not upon one who may occasionally haul a few loads, in an emergency, for another, when that is not his calling.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. KROME & HADLEY, for the appellant.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action to recover a penalty for the violation of an ordinance of the city of Collinsville, in which a judgment was rendered for the defendant, and an appeal taken by the city.

It is unnecessary to discuss the various points raised by appellant on this record, the real controversy turning upon the true construction of the ordinance alleged to have been violated. It is ordinance numbered four. The eleventh section is as follows: "There shall be levied upon every hackman, drayman, omnibus driver, carter, teamster, cabman or expressman, and all others pursuing a like occupation, the sum of ten dollars for a license."

It is very evident, a tax upon a business, calling or occupation, is the sole object and purpose of this enactment. It could never have been designed that a farmer, driving his team through the streets of the city, should obtain a license so to do, although he would be, *pro hac vice*, a teamster. The ordinance is aimed at those who make it a business to use hacks, drays, etc., for hire.

In this case, the defendant was a farmer, and nothing more, who, on emergency, was employed by a miller to haul some flour to market. He hauled two loads, and that was all of it.

This is not like *Gartside* v. *East St. Louis*, 43 Ill. 47. There, the business of Gartside was transporting coal in his

heavy coal wagons, from within the city to places outside of the city.

We do not think the defendant's case came within the spirit and meaning of this ordinance, and the judgment was right, and must be affirmed.

Judgment affirmed.

THE CAIRO AND VINCENNES RAILROAD COMPANY

v.

JAMES FACKNEY

1. ACTION—*for money paid, etc.* If a party, at the request of a railway company, takes up certificates of indebtedness issued by it to its laborers for work, and to procure board, and to enable boarding house keepers to obtain groceries and provisions for hands engaged in the construction of the road, with an agreement to settle with him for the same, such party will be entitled to recover of the company the amount of such advances.

2. LIEN—*against railroads.* The lien given by statute against the property of a railway company is only for materials used, supplies furnished, and for labor performed in constructing, repairing, operating or maintaining the road. The loan of money, or the payment of its creditors, is not embraced in the statute giving the lien.

3. SAME—*no lien exists for money advanced in taking up certificates of indebtedness.* A party who, at the request of a railway company, takes up its certificates of indebtedness given to its laborers and others for the boarding of hands, is not entitled to any lien, under the statute, against the company or its property.

4. ASSIGNMENT OF LIEN. Although a laborer upon a railroad has a lien by statute for the sum due him, it is not assignable at law, and, even if assignable, it would not entitle the holder of the same to assign the lien.

5. REMEDY *for enforcement of liens.* Liens are enforceable in equity unless the law has provided another mode. This is true of vendor's liens, equitable and other mortgages, and all statutory liens, except when the lien is in the nature of a pledge, and possession accompanies the lien. A court of law does not possess the means of enforcing such liens.

WRIT OF ERROR to the Circuit Court of Lawrence county; the Hon. JAMES C. ALLEN, Judge, presiding.

Mr. SAMUEL P. WHEELER, for the plaintiff in error.

Mr. GREEN B. RAUM, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought by defendant in error, in the Lawrence circuit court, against plaintiff in error, for goods sold and delivered, for supplies necessary for the operation of the railroad, and for goods and supplies furnished employees of plaintiff in error, necessary for the operation of its road, under contract therefor. The declaration contains an averment, that, under the statute, plaintiff was entitled to a lien upon all the property, real, personal and mixed, of the company, for the supplies thus furnished; that they were furnished within six months before the commencement of the suit.

The company entered its appearance, and filed the plea of the general issue, at the August term, 1874, and a trial was had at that term, by the court without a jury, by consent of parties, and the court found for the plaintiff, and rendered a judgment in his favor for $7939.19, whereupon the company sued out this writ of error.

It appears that, by arrangement between the company and defendant in error, he took up a large amount of certificates given by the company to employees and hands, to procure provisions for their subsistence, which were endorsed to defendant in error. He also received a transfer of large claims for labor done on the road, and received from the persons performing the labor, powers of attorney to collect the same. At various times, on taking up these several amounts, defendant in error presented a statement of the various sums thus purchased, and the company, by its proper officer, gave certificates that the aggregate sum was for supplies furnished

by defendant in error to the company, and the amount was due and unpaid. It is claimed that this gave him the lien provided for by statute.

The statute declares (R. S. 1874, p. 671, sec. 51,): "That all persons who may have furnished, or who shall hereafter furnish, to any railroad corporation now existing or hereafter to be organized under the laws of this State, any fuel, ties, material, supplies, or other article or thing necessary for the construction, maintenance, operation or repair of such road, by contract with said corporation, or who have done and performed, or hereafter shall do or perform, any work or labor for such construction, maintenance, operation or repair, by like contract, shall be entitled to be paid for the same as part of the current expenses of said road, and in order to secure the same shall have a lien upon all property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor: *Provided*, suit shall be commenced within six months after such contractor or laborer shall have completed his contract," etc.

The court, in the judgment rendered, declared that the plaintiff was entitled to, and the judgment should be, a lien upon all the property of defendant—real, personal and mixed.

The only question discussed is, that the lien given by the statute is not assignable, and that, if so, the court could not make the judgment a lien on the property of the road. As we understand the evidence, defendant in error, at the request of the company, took up certificates issued by them to their laborers for work, and to procure board, and to enable boarding house keepers to obtain flour, meat, groceries and provisions for the hands engaged in the construction of the road, and with a promise that they would settle with him every thirty days, and give him a note due at sixty days. That in pursuance of this agreement defendant in error took up large amounts of such indebtedness of the road. Settlements were made at

different times, and notes then given were taken up and paid, but a receiver of the road having in some manner been appointed, no more settlements were afterwards had or payments made Under this arrangement there can be no doubt that defendant in error was entitled to recover for advances thus made. It was done at the special instance and request of the company, and on their agreement to pay the money so advanced. Defendant in error testified that he made the advances on the credit of the company, and looked alone to them for payment, and hence he is entitled to recover.

But does this give him a lien? We think not. He furnished the means to pay laborers and others to whom the company were indebted. Had he loaned the money to pay these hands and creditors, we presume no one would contend that he thereby acquired such a lien, as such a transaction is not embraced in the provisions of the statute. The statute only embraces materials used, supplies furnished, and labor performed in constructing, repairing, operating or maintaining a railroad. The loan of money is not embraced in the enumeration, nor is the payment of their creditors. Had he, by agreement, advanced supplies to the road, and had they distributed them to their hands, then a different question would have been presented, which we will not now determine, as it is not before us for decision. The company were indebted to these various persons, and defendant in error paid them for and at the request of the company.

There was another class of indebtedness he paid, which was for labor performed for the company. These certificates, like the others, were due to those performing the labor, and they had a lien against the road. Defendant in error holds powers of attorney for their collection, but no assignment of these claims. In fact, they are not assignable at law, so as to enable him to maintain an action in his own name. But, even if so assignable, that would not enable the holder to assign the lien. If it can be assigned at all, which may be doubted, it would be only equitable, and the assignee would have to

resort to a court of equity for its enforcement. Liens are enforceable in equity, unless the law has provided for another mode. This is true of vendor's liens, equitable and other mortgages, and all statutory liens, so far as they now occur to us, except in all cases where the lien is in the nature of a pledge, and possession accompanies the lien. If defendant in error had a lien, he should have resorted to equity for its enforcement. A court of law does not possess the means of enforcing such liens.

So much of the judgment, therefore, as declares and gives a lien, is erroneous, and the judgment is reversed, and the cause is remanded, with leave to defendant in error to have a proper judgment entered.

Judgment reversed.

CHARLES H. ROBERTS *et al*

v.

CALVIN STIGLEMAN *et al.*

1. CHANCERY PRACTICE—*filing further answer.* After replication is filed, the defendants in a chancery suit can not put in any amended or new answer without leave of court, except when required to do so by the court; and if the same is so filed without leave or requirement of the court, it will be disregarded.

2. SAME—*when sworn answer must be proved.* If a sworn answer to a bill in chancery sets up new matter in defense, not responsive to the bill, as, a homestead exemption to a bill to foreclose a mortgage, the defendant must sustain the same by proof.

3. SAME—*setting cause for hearing on bill and answer.* When new answers are filed after replication without any leave or order of the court, and the cause is heard without any replication to the new answers, they will not be taken as true, but will be disregarded.

4. SAME—*practice on death of one of several complainants.* On bill to foreclose a mortgage by several partners, given to secure a partnership debt, a bill of revivor is not necessary on the death of one of the partners, but, the death being shown to the court, the suit may be prosecuted by the survivors.

WRIT OF ERROR to the Circuit Court of Jersey county; the Hon. DAVID M. WOODSON, Judge, presiding.

Mr. WARREN & POGUE, for the plaintiffs in error.

Messrs. S. T. & R. S. SAWYER, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill in chancery, brought by the defendants in error, together with Orleans M. Adams, as partners, under the name of Stigleman & Co., against the plaintiffs in error, Charles H. Roberts and Elizabeth T., his wife, to the September term, 1859, of the Jersey circuit court, to foreclose a mortgage executed by the two latter to Stigleman & Co., July 10, 1858, upon two lots in Jerseyville, to secure the payment of two notes of that date, executed by said Charles H. Roberts to Stigleman & Co., each for $237.50, payable in eight and twelve months. There was no release of any homestead right in the mortgage. The bill did not waive answer under oath.

At the September term, 1859, on the 7th day of September, the defendants filed their separate sworn answers to the bill, admitting the execution of the mortgage and setting up a homestead right in the mortgaged premises, and asking that commissioners be appointed to set off the homestead. On September 9th, of the same term, a replication was filed to the answers. On September 6, 1860, there was filed an answer purporting to be by the defendants, signed by H. H. Howard alone, as their solicitor, and not sworn to. This was without leave of court or motion for leave.

On the 17th of April, 1861, the defendants, without leave of court or motion therefor, filed further answers, sworn to.

The last two answers of September 6, 1860, and 17th April, 1861, set up a homestead right, and differed from the first answer in setting up the particular facts showing the exist-

ence of a homestead right, while the first only alleged, generally, the existence of a homestead right.

There was no replication to the last two answers.

The cause was continued from term to term until April term, 1865, when complainants suggested the death of Orleans M. Adams, and the suit was ordered to be further prosecuted in the name of the surviving partners, Stigleman and Patterson.

There was a reference to the master to compute the amount due on the notes and mortgage, and the cause coming on to be heard upon the bill, answers of defendants, report of master in chancery, exhibits and proofs, a decree was entered against the defendants, that, in default of payment of the amount found due by a day named, the premises be sold for the payment thereof. Sale was made under the decree.

More than nine years after the entering of the decree, the said Roberts and his wife bring this writ of error for a reversal of the decree.

The defendants here put in their sworn answers to the bill, to which the complainants filed a replication, and under the 32d section of the Chancery Act: "After replication is filed, the cause shall be deemed at issue, and stand for hearing at the next term." The cause, then, was at issue upon the filing of the replication to the first sworn answers, and under the rules of chancery practice the defendants could not put in any amended or new answer without first applying to the court for leave to do so, or having been required by the court to do so.

The subsequent answers having been filed without such leave or requirement, or any application for the purpose, they must be disregarded as forming any part of the record.

There was sufficient evidence to support the decree in the admissions in the answers of Roberts and his wife of the execution of the mortgage, and in that of Roberts of the execution of the notes, and in the master's report showing the amount due upon the same. The claim of a homestead right which was set up in the answers was new matter, not respon-

sive to the bill, and it was for the defendants to make proof thereof. The record contains no evidence whatever in regard to a homestead right.

Plaintiffs in error take the position, that as no replication was filed to the last two answers, filed on the 17th day of April, 1861, and the 6th day of September, 1860, they are to be taken as true; and they set up a homestead right in the premises, and allege facts showing the existence of such right. True, the statute provides that, in default of filing a replication to an answer, the court may set the cause for hearing upon bill and answer, in which case the answer shall be taken as true. But there had not been here any order of court setting the cause for hearing upon bill and the answers to which no replication had been filed, and, as before remarked, those answers were irregularly filed under circumstances that the complainants were not required to take any notice of them.

It is suggested, that the court below treated the additional answers as properly filed. There is nothing more in the record from which to infer this, than the recital in the decree of the cause coming on to be heard upon the bill, "answers of defendants," etc. The two separate sworn answers of Charles H. Roberts and Elizabeth T. Roberts, were "answers of defendants," and it does not appear that the recital of the decree referred to anything more than these. It can not be intended that it referred to any other answers than those regularly in. It comes quite short, under the circumstances, of showing that the cause was set by the court for hearing upon bill and the answers to which no replication had been filed, so that, under the statute, those answers were to be taken as true.

There is nothing in the point made, that the suit should have been revived on the death of Orleans M. Adams, by the filing of a supplemental bill. The cause of action here, being a note given to the complainants as partners in trade, survived on the death of Adams, to the surviving complainants;

and the statute expressly provides that, in such case, the suit shall not be abated by the death of one of the complainants, but that, the death being suggested and shown to the satisfaction of the court, the cause shall proceed at the suit of the surviving complainants.

Perceiving no error in the record, the decree is affirmed.

Decree affirmed.

JOHN S. WHEELER

v.

FRANKENTHAL & BRO.

1. STATUTE OF FRAUDS—*parol contract for a lease of lands not void in all cases.* A parol contract, which is required to be in writing by the Statute of Frauds, where the parties treat it as obligatory until executed, is not void; and such a contract may also be available for some purposes in equity, or in an action, in some instances, to recover on a *quantum meruit*.

2. SAME—*contract, when void, can not be used in defense.* A parol contract within the provisions of the Statute of Frauds can not be made the ground of a defense, any more than of an action.

3. SAME—*parol lease not to be performed within a year.* A parol agreement, made in July, for the leasing of land, the term to commence on the first day of August following, and continue for one year thereafter, is within the first section of the Statute of Frauds, and void at law.

4. SAME—*part performance.* Part performance of a verbal contract within the Statute of Frauds has no effect, at law, to take the case out of its provisions. This can only be done in equity.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was an action of forcible detainer, brought by Frankenthal & Bro., against John S. Wheeler, for the recovery of certain mill property.

The proof showed that the plaintiffs leased the property to the defendant for one year, commencing on the first day of

August, 1873, and that on July 1, 1874, the plaintiffs agreed, verbally, to lease the mill for another year, part payment to be made in repairs, and that, under this agreement, the defendant, before August 1, 1874, made repairs to the amount of $250. The court sustained an objection to the proof of the repairs, and their value, under the verbal agreement to lease. The suit was brought August 14, 1874, before a justice of the peace, and taken by appeal to the circuit court, where the plaintiffs recovered.

Messrs. DALE & BURNETT, for the appellant.

Messrs. GILLESPIE & HAPPY, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The first question made on the giving and refusal of instructions by the court below, is: in an action of forcible entry and detainer, when the defendant sets up a contract whereby he claims to have rented the premises from the plaintiff, can the plaintiff be allowed to avail of the objection that the contract is not in writing, and that evidence of it is, therefore, inadmissible under our statute entitled "Frauds and Perjuries?"

It is not, perhaps, entirely accurate to say, as is said in the plaintiffs' first instruction, that a parol contract, where the statute requires the contract shall be in writing, is "void;" for, if the parties themselves treat it as obligatory until it is executed, the objection that it was not in writing can not be urged; and such a contract may, also, be available for some purposes in equity, or in an action, in some instances, to recover on a *quantum meruit;* but the use of the word, "void," in this instruction could do no harm. If the plaintiffs were entitled to avail of the objection that the contract was not in writing, by doing so, the evidence of the contract could not be received as proof of that for which it was offered, and thus,

practically, for the purposes of the trial, the contract was to be treated as void.

The language of the first section of the statute, so far as material for the present, is identical with that of the fourth section of the "act for prevention of frauds and perjuries," adopted by the British Parliament, in the 29th Car. 2d (Roberts on Frauds, 467), the words being, "no action shall be brought," etc.; and we regard the law clearly settled that a contract within the condemnation of this section "can not be made the ground of a defense, any more than of a demand; that the obligation of the plaintiff to perform it is no more available to the defendant in the former case than the obligation of the defendant to perform it would be to the plaintiff in the latter case." Browne on Frauds, sec. 131; *Comes* v. *Lamson*, 16 Conn. 246; *Scotten* v. *Brown*, 4 Harr. (Del.) 324; *King* v. *Welcome*, 5 Gray, 41; *Payson* v. *West*, Walker (Miss.) 515; *Sennett* v. *Johnson*, 9 Barr (Pa.) 335; *Finch* v. *Finch*, 10 Ohio, 507; *Scott* v. *Brush*, 26 Mich. 418.

In our opinion, therefore, the plaintiffs were entitled to the benefit of the objection that the contract relied on by the defendant was within the first section of the statute, and there was no error in the instructions in this respect.

The objection that the court erred in refusing the defendant's instructions, on the ground, *first*, that the contract was for a renewal of the old lease, and was to be performed by the first day of August, 1874, and *second*, that the contract was good under the second section of the statute, which does not require that the contract shall be performed within one year from the making thereof, but simply relates to an interest in lands for a longer term than one year, is untenable.

The defendant himself testifies that the contract under which he claims was for a term commencing August 1, 1874, and ending August 1, 1875, and that the contract therefor was made about the first of July, 1874. We have not been able to discover a particle of evidence justifying an instruction with regard to a different term.

The second ground of objection is completely answered by *Olt* v. *Lohnas et al.* 19 Ill. 576, where it was held that a parol lease for a greater term than one year from the date of the making thereof was within the first section of the statute, notwithstanding the phraseology of the second section. See, also, *Comstock* v. *Ward*, 22 Ill. 248.

The only remaining question is, was evidence of part performance of the contract competent to take the case out of the operation of the statute? Had the defendant filed his bill in equity for specific performance, such evidence would unquestionably have been competent, but whether that offered would have been sufficient for that purpose, it is unnecessary to express an opinion; but this is an action at law, and, says Browne on Frauds, sec. 451, "it is settled, by a long series of authorities, that a part execution of a verbal contract within the Statute of Frauds has no effect *at law* to take the case out of its provisions," and numerous authorities are cited in support of the position. So, too, this court expressly ruled in *Warner* v. *Hale et al.* 65 Ill. 395.

We perceive no substantial error in the record, and the judgment must be affirmed.

Judgment affirmed.

ALFRED B. STOCKLEY, Admr.

v.

WILLIAM GOODWIN.

1. CONTINUANCE—*attorney in legislature.* Where an affidavit for the continuance of a cause on the ground that the party's attorney was in attendance in the legislature as a member thereof, fails to show that the attorney was employed in the case prior to the commencement of the session of the legislature, it will not entitle the party to a continuance.

2. SAME—*second application for same cause not allowed.* The practice will not sanction a second application to continue a cause made at the same term, and based upon the same state of facts as the first.

3. ACTION—*when contract abandoned by mutual consent, a recovery may be had for services performed.* Where the plaintiff moved into the house of a party under an agreement to work such party's farm, and take care of him as long as he lived, in consideration of which, such party was to leave the plaintiff his property by will, and continued to work under this contract for about eight months, when, owing to a misunderstanding, the plaintiff left the house, but continued to work the farm, and such party, prior to his death, devised his property to another: *Held*, in a suit against the estate, to recover for the services, that the jury were warranted in finding that the contract had been abandoned by consent, and in finding for the plaintiff the value of his services.

APPEAL from the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

This was a claim originally presented by William Goodwin against the estate of Isaac Young, deceased, for services. The claim was allowed by the county court, and the administrator of the estate appealed the cause to the circuit court. On a trial in the latter court, the jury found in favor of the plaintiff, in the sum of $247. The plaintiff remitted $31, and the court rendered judgment for the balance against the administrator, to be paid in the due course of administration. From this judgment the administrator appealed.

Mr. B. B. SMITH, and Mr. J. DONOVAN, for the appellant.

Messrs. BRYAN & KAGY, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The first question presented by this record arises upon the decision of the circuit court in overruling appellant's motion for a continuance, entered on the first day of the term.

The motion was made under section 47, Revised Statutes of 1874, page 780, which provides for a continuance of a cause under certain circumstances, where the party, or his attorney, may be a member of the legislature.

The affidavit filed failed to state that the attorney, who was a member of the legislature, had been employed in the cause

prior to the commencement of the session, as required by section 48 of the act, and for this reason the court properly overruled the motion for a continuance.

On the 4th day of the term, appellant entered another motion for a continuance upon the same ground, and filed an affidavit, in substance, as required by the statute. This motion was also overruled.

We are aware of no practice which would sanction a second application to continue a cause, made at the same term of court, and based upon the same state of facts. Such a practice would, in effect, be allowing an affidavit for a continuance to be amended, which has never been permitted by any court of which we have any knowledge.

It is urged by appellant that the court erred in modifying his instructions one and two, and in giving appellee's instructions one, five and six.

This action was instituted by appellee against the estate of Isaac Young, deceased, to recover for one year's labor performed for Young in his lifetime.

It is clear, from the evidence, that appellee labored from the spring of 1870 to the spring of 1871 for Young, and that his work was worth $18 per month, which would make the amount for which judgment was rendered in the circuit court.

The controverted question is, whether appellee, in view of the arrangement under which the work was done, is entitled to recover.

The testimony shows that, in the spring of 1870, appellee moved into the house of Young, and undertook to work the farm, consisting of forty acres, and take care of Young so long as he should live, in consideration of which, Young agreed to will appellee his property. After appellee had worked about eight months, a misunderstanding arose between the parties, and appellee moved to another house, and left the house of Young, but he continued to work for Young until the year expired, when it appears an arrangement was made

by which appellee again moved into the house of Young, and remained there until the spring of 1874, cultivating the farm for a share of the crops.

Young did not will his property to appellee, but devised it to a son of his first wife.

We see no reason why the jury was not warranted in arriving at the conclusion that the arrangement first entered upon by the parties was abandoned, and if that be true, the right of appellee to be rewarded for his services is beyond dispute. After eight months' labor had been performed, and appellee and his wife left the house of Young, it is unreasonable to believe that either appellee or Young regarded the original arrangement in force, and yet appellee continued to work for Young until the year expired.

If appellee had abandoned the contract without the consent of Young, at the end of eight months, it is not at all probable that he would have continued to work four months longer, with the fact before his eyes that he could recover nothing for his labor.

The facts before the jury all tended to establish the proposition that the original arrangement was set aside by the mutual consent of the parties. Such being the case, the jury could do nothing less than award to appellee the amount his labor was reasonably worth.

In this view of the case, even if the instructions were technically inaccurate, they did no harm, as the verdict was right upon the evidence.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

JOHN B. CRAFT

v.

ELIJAH S. DICKENS.

MISTAKE—*correcting in attachment bond.* A court of equity will not assume jurisdiction to reform an attachment bond for a mistake, as the party complaining had an ample remedy at law to have the same corrected in the court where the attachment was pending.

WRIT OF ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

This was a bill in chancery, filed by John B. Craft, against Elijah S. Dickens, to reform an attachment bond by correcting certain mistakes made in drafting the same.

It appears, from the bill, that Dickens sued out an attachment, before a justice of the peace, against Craft, claiming $20, and executed an attachment bond in the cause, payable to "John B. Craft, executors, administrators or assigns." The condition of the bond was: "Now, if the said Elijah S. Dickens shall prosecute his said suit with effect, in the case of a failure therein, shall well and truly pay and satisfy said John B. Craft all such damages as shall be awarded against the said *John B. Craft*, executors or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out." etc.

The bill charged that the bond was intended to be made payable to John B. Craft, *his* executors, administrators or assigns; also, that it was intended to make the condition of the bond that, if the said Dickens, in case of a failure to prosecute his suit with effect, should pay all such costs in said suit, and such damages as should be awarded against said *Dickens*, his heirs, etc.

The bill showed that Dickens did not prosecute his suit with effect, but that judgment was rendered therein in favor

of Craft for costs, and prayed that the bond might be reformed, etc.

The circuit court sustained a general demurrer to the bill, and dismissed the same, which is assigned for error.

Mr. B. B. SMITH, and Mr. W. W. WILLARD, for the plaintiff in error.

Messrs. BRYAN & KAGY, for the defendant in error.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This bill was to correct a mistake which is said to have occurred in an attachment bond taken in a case wherein Elijah S. Dickens was plaintiff and John B. Craft was defendant. A demurrer interposed was sustained, and the bill dismissed. That decision is the only error assigned.

Whether there is any such defect in the bond as would render it invalid, is not necessary to inquire; but conceding a mistake did occur in the execution of the bond, it is plain equity will not assume jurisdiction to reform it, for the reason the statute has given courts of law, in which all attachment proceedings are had, ample powers to allow amendments at the trial, and complainant should have made his application to have the bond corrected in the court where he was sued. Having failed to avail of the remedy given by law, equity will afford him no relief.

The decree dismissing the bill will be affirmed.

Decree affirmed.

GEORGE KELLER

v.

FRANKLIN W. BRICKEY.

1. SWAMP LANDS. Under the act of Congress of September 28, 1850, the title to the swamp and overflowed lands of the United States within this State, unsold, was vested *ipso facto* in the State of Illinois, and a patent for a tract of such land, made by the United States after the passage of that act, passes no title.

2. SAME—*what is swamp land.* It is not necessary, to constitute swamp and overflowed land, within the meaning of the act of Congress, that it should be overflowed annually. It is sufficient if it is subject to overflow, requiring artificial means to subject it to beneficial use.

APPEAL from the Circuit Court of Jackson county; the Hon. M. C. CRAWFORD, Judge, presiding.

Mr. JAMES M. DILL, Mr. A. S. WILDERMAN, and Mr. L. P. BUTLER, for the appellant.

Mr. WILLIAM J. ALLEN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was ejectment, in the circuit court of Randolph county, and by change of venue taken to Jackson county, and there tried by the court without a jury, resulting in a judgment for the plaintiff.

The controversy is between the grantee of the patentee from the United States and a settler upon the land, claiming the same under the State as swamp and overflowed land, by deed duly executed by the county clerk of Randolph county.

The patent under which the plaintiff claims bears date August 15, 1860, and the deed from the county clerk is dated January 29, 1862.

It is claimed by plaintiff in the action, that the land in controversy is not swamp and overflowed land of the description granted to the State by the act of Congress of September

28, 1850, entitled "An act to enable the State of Arkansas, and other States, to reclaim swamp and overflowed lands within their bounds."

The direct proof on this point is that of Anton Blais, who had been familiar with the tract in question since 1833 or 1834, who testified it was heavily timbered, rather low and wet, and not fit for cultivation until 1858; more than half of it was low and wet in 1849, and before; after it was donated to the county, the lands around it in better condition were bought up; there were some ridges in it that were pretty good ground; they were scattered over it; were not large, and the rest of the land was swampy; it is about three-fourths of a mile from the Mississippi river; the land near the river is better; this tract was overflowed in 1826, 1836, 1844, and 1858, and perhaps other years; it was all overflowed those years; we rowed over it in skiffs, the water in some places being ten feet deep; when overflowed, the water would remain in some places until winter. It was sold to witness by the county as swamp land, and was conceded so to be.

There was no evidence whatever conflicting with this.

The deed from the county clerk to Blais recites that, in pursuance of the act of the General Assembly of this State, entitled "An act to dispose of swamp and overflowed lands, and to pay the expense of selecting and surveying the same," approved June 2, 1852, and an act to extend said act, approved March 4, 1854, James H. Watt, drainage commissioner of Randolph county, did, on the 9th day of September, 1857, expose said land to public sale, the same being a part of the swamp and overflowed lands granted by the United States to the State of Illinois, by an act entitled "An act to enable the State of Arkansas, and other States, to reclaim swamp and overflowed lands within their bounds," approved September 28, 1850, and that there were no bidders for the same.

The evidence here presented, and this action of the county, are quite sufficient to show this tract was swamp land. It would be more satisfactory did the deed recite further, that it

was contained in the list of swamp lands furnished by the Auditor, which the act of the legislature required him to furnish to the several counties; but, as it is, it is strong evidence the land was swamp and overflowed land, in the purview of the act of Congress. It was not intended by that act that the land should be overflowed annually, but that it was subject to overflow, requiring artificial means to subject it to beneficial use. That it was swampy, and the greater portion of it wet and unfit for cultivation, the evidence of Blais fully establishes.

The tract in question being of the description embraced in the act of Congress of September 28, 1850, it became, at that date, the absolute property of the State, subject to its control, and in which the government of the United States, thenceforward, had no interest, and could not sell it to another.

That this is the doctrine, is clearly established by the case of the *Railroad* v. *Smith*, 9 Wallace, 96, where the subject is fully discussed. That these lands so granted to the States were, by various acts of the legislature, vested in the counties in which they are situate, appears by the acts cited, and by the last act passed on the subject, approved February 14, 1859. Sess. Laws, 1859, p. 201.

Whatever this court may have decided in respect to the condition of the title to these lands, the Supreme Court of the United States, whose prerogative it is to construe acts of Congress, must be regarded as authoritative on this question. That court having decided that, by the terms of the act of September 28, 1850, the title to these lands vested *ipso facto* in the State, the State, having competent authority, passed the title to the counties, and to Randolph county among others.

The title being in that county, it was sold by the proper officer of the county at private sale, there being no bidders for it at the public sale, and this in strict conformity with section 19, of the act of 1852. Sess. Laws, 1852, p. 183.

By section 11, of the act of 1854, (Sess. Laws 1854, p. 21,) the deed of the county clerk vested in the purchaser the absolute title, in fee simple, to the land described in it, being the land in controversy.

The court erred in finding the title in the plaintiff, and for the error the judgment is reversed and the cause remanded.

Judgment reversed.

Mr. CHIEF JUSTICE SCOTT: I adhere to the construction given by this court to the Swamp Land Act of 1850 in *Thompson* v. *Prince*, 67 Ill. 281, and refer to the opinion in that case for an expression of my views. In harmony with that case is the case of *Burgess* v. *Gray et al.* 16 Howard, 48.

THE PEOPLE *ex rel.* The Cairo and St. Louis R. R. Co.

v.

THE TRUSTEES OF SCHOOLS.

SAME *v.* SAME

1. SCHOOL TOWNSHIPS—*are not municipal corporations.* School townships, being created and continued only for educational purposes, and not for the purpose of exercising any of the functions of government, are not municipal corporations in their nature or purpose.

2. TAXATION—*constitutional limitation for corporate purposes.* The provision in the constitution of 1848, that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be invested with power to assess and collect taxes for corporate purposes," was intended to limit the legislative power in conferring authority on corporate bodies to assess and collect taxes.

3. SAME—*what is a corporate purpose.* A corporate purpose, within the meaning of the constitution authorizing taxation for the same, is a purpose necessary or proper to carry into effect the object of the creation of the corporate body.

4. A tax by a school township or district to aid in the construction of a railroad, or to pay interest on bonds issued in aid of such road, is not

for a corporate purpose, and such power can not, constitutionally, be conferred on such bodies. It seems that such a power can be conferred only upon purely municipal corporations.

5. CONSTITUTIONAL LAW—*old constitution governs in cases arising under it.* Although the constitution of 1848 has been superseded by the present one, still all rights acquired under it, or under laws passed while it was in force, must be tried by and enforced as though it was in full vigor.

APPEAL from the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

These two cases were proceedings by *mandamus*, on the relation of the Cairo and St. Louis Railroad Company, against the trustees of schools of two different townships, to obtain from the townships the bonds voted by them to be issued to the relator upon a compliance with the conditions imposed in the vote and subscription.

The charter of the company provided that certain school townships might, upon a vote of the people, subscribe to the capital stock of the company, to be paid for in the bonds of the township. A vote was had in the defendant townships, which resulted in favor of subscribing to the stock of the relator, and the subscription was made by the school officers.

After complying with the conditions of the subscription, the relator applied for the bonds, which were refused.

Mr. W. S. SEARLS, for the relator.

Mr. ALBERT N. SPRAGUE, and Mr. JOHN MICHAN, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The question is distinctly presented by this record, whether a township, organized for school purposes by the general school law, could, under the constitution of 1848, be empowered to incur a debt for the purpose of subscribing for the stock of a railroad company; whether contracting such a debt, and the levy and collection of taxes to pay the same,

with its accruing interest, can be held a corporate purpose, within the meaning of that instrument.

It is urged by appellees, that Art. IX, Sec. 5, of that constitution prohibited the General Assembly from conferring that power on such a body; that the creation of such a debt, and the levy of such a tax, is not for a corporate purpose. That section provides that, "the corporate authorities of counties, townships, school districts, cities, towns and villages may be invested with power to assess and collect taxes for corporate purposes." This clause was manifestly intended to limit the legislative power in conferring authority on corporate bodies to assess and collect taxes. Without any provision in the constitution on the subject, the General Assembly have the power to impose taxes as they may choose. They could impose a tax on one species of property, and exempt another. They could fix the mode of ascertaining and the manner of its imposition as they might choose, if the power was not limited, and the mode prescribed in the fundamental law. This was then, most clearly a limitation of legislative power.

Had this restriction not been imposed, the General Assembly could have empowered any of these *quasi* corporations or municipalities to levy and collect taxes for any purpose, whether germane to the object of its organization, or for other purposes. They could have authorized a school district to levy and collect a tax to build a court house, a jail, bridge or other county object; or a school township or district to erect a poor house and maintain the paupers of the county.

These school townships were created and are continued for school purposes alone, and not for municipal purposes. They are only intended to establish schools, and loan and manage the school fund of the township, and pay the teachers of schools taught in their jurisdiction. This is the purpose of their organization. They were not created to exercise any of the functions of government, and hence are not municipal in their nature or purpose, nor are they provided with the officers or the power to exercise the functions of government.

Cities, towns and villages are endowed with such powers and are created and maintained for their exercise. Their very object is to aid in the government of the people. And such is true, in a more limited sense, of counties. But none of these functions are conferred upon school townships or districts, but their creation is purely to aid in the great scheme of accomplishing universal education.

The body of men who framed the constitution must be supposed to have known the meaning of the language employed, and they must have believed that it would be understood in its ordinary sense, and they must have supposed it would receive a reasonable interpretation and a practical application in the administration of government. When, therefore, they used the language "for corporate purposes," they supposed that, if any question arose in the construction of this clause, the legislative, executive or judicial department of the State, which was required to apply its principles, would look and see what was the object of the creation of the body, and limit it to that purpose. They did not, on the one hand, expect that there would be an effort to push the construction to the extent that it would embrace all purposes which might by possibility be brought in the corporate power. Nor yet, on the other hand, to so contract and narrow the construction as to exclude purposes that are embraced in their charters, but which may not be strictly germane to corporations of that character, but that it would be held to authorize the exercise of the power, when the body is created for specified public purposes, although of a mixed character, as, if these school townships had been empowered, in addition to the duties imposed upon them, to locate, open and maintain roads in the limits of their territory, then they could have been empowered to levy a tax for the maintenance of roads, as that would have been a corporate purpose.

But school townships are not invested with such powers over roads, and hence they can not be invested with authority to assess and collect a road tax, nor can it be until one of the

purposes of its existence shall be to repair the roads in the township. To give any other construction would be to abrogate and wholly disregard this provision. To say that, because the General Assembly confers the power to levy a tax for any purpose, the law of the organization of such body is thereby changed, and the tax is for a corporate purpose, would be to render this restriction wholly nugatory. We fail to comprehend the force of such reasoning, and we must give some effect to this constitutional provision. Although that constitution has ceased to be a rule for the guidance of the departments of government, still all laws adopted whilst in force, and all rights acquired under it, must be tried by and enforced as though it was in full vigor.

Had the construction contended for by appellant been what was intended, why not have simply said that these bodies might be invested with power to "assess and collect taxes?" Or why insert any provision on the subject, and let the power of the General Assembly remain unrestricted? That strikes us as the more natural and reasonable course that would have been pursued. Tested by these rules, the subscription by a school township or school district for the stock in a railroad company, or the levy of a tax to raise the money to pay for the same, can not be held to be a corporate purpose. Such a tax in nowise aids or promotes education, for which such bodies are created. And this is the construction given to this clause in the cases of *Trustees of Schools, etc.* v. *Toledo, Wabash and Western Railway Company*, 63 Ill. 299, and *People ex rel.* v. *Dupuyt*, 71 Ill. ——, when the same question was before the court as is presented by this record.

It is, however, urged that townships in counties under township organization have been held capable of subscribing to the stock of a railroad company, and levying a tax for the payment of the same, and that the same rule should be applied to a school township. All of the congressional townships in the State are created *quasi* school corporation, and are vested with limited powers to establish schools and perform a few

functions pertaining to that object. On the other hand, townships created under the township organization law are invested with numerous and important governmental functions. They are authorized to locate, open and maintain roads, to construct and repair bridges, to pass by-laws regulating fences, and the conditions under which stock may run at large. Thus it is seen these bodies are municipal in their character, and school townships have no such power, but the purpose of their creation is entirely different.

It is urged that a liberal construction should be given this clause, and by doing so, school townships may be embraced in its provisions.

It was only by the most liberal construction that counties, cities and towns were held to be embraced in this provision, and it was mainly in deference to the other departments of government in following the construction they had given this clause, and from the fact that these bodies were intrusted with making and repairing roads and bridges, that it was held to be a corporate purpose, but in doing so, construction was pushed to the utmost verge; and to hold that school townships and school districts were embraced, would be to make an immense advance on the construction there given; nor does it follow that, because the courts have given the most liberal construction, and sustained doubtful powers, they will advance farther and embrace and sustain unauthorized powers. It is not a justifiable rule of interpretation, that, because a very liberal construction has been given, the courts must give one more liberal. A point must be reached where there must be a limit of power under this clause.

If, because a municipal corporation, created for governmental purposes, may be invested with such powers, it does not follow that some other body, having some of the attributes of a municipal corporation, may be. It may be, and probably is true, that, to be constitutional, such a power could not be conferred upon any but purely municipal corporations.

It is said that municipal townships were not in existence

when the constitution of 1848 was adopted, and that school townships were. This is true, but that instrument provided for their organization. And knowing that, when organized, they would be municipal, they were as fully embraced in this provision of that article as were counties, cities, towns and villages. In fact, it fully embraces all such corporations created for public purposes that were then in existence, or that should be thereafter created. If a new county, city or town were created, it would fall as fully within the provision as one already brought into existence.

Nor does the argument, that, simply because the construction of a road would promote the interest and advance the prosperity of the township, render it a corporate purpose. It may show that the people of the township had been unfortunate in the county not having adopted township organization, and the township thus become a corporation capable of aiding in the construction of the road. But it does not follow that, because they were not in a position to avail of the constitutional provision, it shall be wholly disregarded, and held for naught.

On a careful review of the former decisions of this court, and the reasons which led to them, in the light of the argument of counsel for appellants, we do not see even the slightest grounds for overruling or modifying the principles of those decisions, but, on the contrary, we are fully satisfied with them, and we must regard them as announcing the settled law of this court.

The judgments of the court below are affirmed.

Judgments affirmed.

Mr. JUSTICE BREESE: I have never doubted the authority of the legislature to confer upon school townships the power to take stock in a railroad projected through the school township. Such a work may greatly enhance the value of the school lands belonging to the township, and the dividends on the stock may relieve the people from the payment of taxes to support schools therein.

JAMES D. JOHNSON *et al.*

v.

JAMES M. PACE, Garnishee.

GARNISHMENT—*moneys transferred before service and held for the transferee.* Where a school teacher, being indebted, drew an order on the treasurer of the school district for the sum he was entitled to receive, in favor of his creditor, which was accepted by the board of directors on condition he completed his contract, and the creditor, on the back of the order, authorized the secretary to draw the money for him, which he did, as agent for the creditor, on orders drawn in favor of the teacher before the time limited in the order for payment, and before he was garnisheed by another creditor of the teacher: *Held*, that such agent was not liable to the garnishee process, as the money in his hands at the time did not belong to the teacher, but was held as the agent for the first named creditor.

APPEAL from the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Messrs. CASEY & WILSON, and Mr. C. H. PATTON, for the appellants.

Messrs. CREWS & HAYNES, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit by attachment, brought by Johnson, Taylor & Co. against George H. Woodward, before a justice of the peace, wherein there was service upon James M. Pace, as garnishee, June 29, 1874. There was judgment against the garnishee before the justice of the peace for $139.15. On appeal from the judgment to the circuit court, Oliver Holmes appeared there, and claimed the money which was in the hands of the garnishee, and on trial before the court, without a jury, the court found that the money which was in the hands of Pace, and in controversy in the suit, belonged to Holmes, and discharged Pace as garnishee, to reverse which judgment Johnson, Taylor & Co., the attaching creditors, bring this appeal.

Pace was secretary of the board of education of Mt. Vernon, in this State. On April 30, 1874, Woodward, the defendant in the attachment suit, who was the principal of the Mt. Vernon high school, under control of said board of education, drew an order, in writing, signed by himself, addressed to Joel F. Watson, treasurer of school district No. 1, directing him to pay to the bearer, Oliver Holmes, $231.25, and charge the same to his account, to pay the same on July 5, 1874, out of any money that might come into his hands belonging to him, Woodward. Upon the back of the order there was an acceptance, in writing, of the same date, signed by Thomas H. Hobbs, president, and James M. Pace, as officers of said board of education and district No. 1, accepting the order, on condition that Woodward continued to discharge the duties of principal to the termination of his contract, July 1, 1874. There was also indorsed upon the order an authority, in writing, signed by Holmes, authorizing Pace to receive the money due Holmes, in accordance with the order. Woodward owed Holmes the money at the time he gave the order.

On the 13th of June, 1874, Pace drew from Watson, treasurer of town. 2 south, range 3 east, 3d principal meridian, (Mt. Vernon township) $123, upon school order No. 165, signed by Hobbs as president and Pace as secretary, and on June 25, 1874, he drew from the same source, upon the same kind of order (No. 177), $61. Both of the orders were in favor of Woodward, being in the usual form of school orders drawn by the school officers upon the town treasurer in payment of teachers' salaries. The money was paid to Pace as Holmes' agent. It was, at the times it was paid, all due to Woodward. Pace had the money in his hands at the time he was garnisheed, June 29, 1874.

It was in respect to this money, and upon this state of facts, that it was sought to charge Pace as the garnishee of Woodward.

We can not doubt that, at the time of the service of the garnishee process upon Pace, June 29, 1874, this money in

his hands should be considered as belonging to Holmes, and not to Woodward. Woodward had previously appropriated it to Holmes, and did all he could to vest Holmes with the right to it, by giving him the written order for it of April 30, 1874. The money was received by Pace, as the agent of Holmes, from the town treasurer, on the school orders in favor of Woodward, and was held in Pace's hands as the agent of Holmes.

We do not conceive that it makes any difference, as is supposed, that the money was paid to Pace previously to July 5, 1874—the day Woodward, by his order, directed the town treasurer to pay it to Holmes. Woodward's indebtedness to Holmes existed at the time he gave this order, and it was the intention that Holmes should have this particular money coming due to Woodward as school teacher.

As between Woodward or his creditors and Holmes, the latter's right to the money was not dependent upon the arrival first of the 5th day of July, 1874, but that date was evidently named for the benefit of the school officers, so that they would not be required to make the payment to Holmes before that time.

Nor do we discover here any such violation of duty or improper practice, as school officers, as is claimed by appellants, which should deny to Holmes the benefit of this money. The acceptance by the president and secretary of the board of education of the order drawn by Woodward in favor of Holmes on the town treasurer, to be sure, was out of the line of their duty as school officers, but it was without effect, and merely harmless. It was not by means of this order that the money was obtained from the town treasurer, but there were regularly drawn school orders on the town treasurer, signed by the proper school officers, as authorized by law, in the usual form of school orders for the payment of teachers' salaries, and it was upon these orders that the town treasurer paid the money to Pace. The only significance of the order to Holmes was as

between the latter and Woodward, denoting Woodward's purpose that Holmes should have the money.

The judgment of the circuit court, discharging the garnishee, will be affirmed.

Judgment affirmed.

ISAAC TREPP

v.

DAVID BARKER.

WITNESS—*competency of wife for her husband.* The fact that a party's wife was present when he purchased goods, and selected them, with the assistance of her husband, does not make her the agent of the latter, and in a suit against him for the price, the wife is not a competent witness in his behalf, to prove that the goods were furnished on the credit of a third person, in payment of a debt of such third person to the husband.

APPEAL from the Circuit Court of Jersey county; the Hon. CYRUS EPLER, Judge, presiding.

Mr. GEO. W. HERDMAN, for the appellant.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action brought by appellant to recover $49.25 for goods sold and delivered to appellee.

It was conceded by appellee that he had the goods, but the defense interposed was, that one Pool was indebted to him for boarding, and that he and Pool went to appellant's store and made an arrangement by which the goods were obtained, and that they were to be charged to Pool, and appellee received them in payment of Pool's board bill.

Appellant and his clerk both testified the goods were sold and charged to appellee, while appellee and Mrs. Wilkins testified the goods were to be charged to Pool.

Thus far, the testimony seemed to have been evenly bal-

anced. In order to turn the scale, however, appellee called his wife, who was present when the goods were purchased, and assisted in selecting them, and proved by her that the goods were obtained upon the credit of Pool. To this evidence the appellant objected, but the court decided appellee's wife was a competent witness, and her evidence was allowed to go to the jury. This decision is relied upon by appellant as a ground for reversing the judgment.

Section 5, chapter 51, Revised Statutes of 1874, page 489, declares, "No husband or wife shall, by virtue of section 1 of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the existence of the marriage or after its dissolution, except in certain specified cases," of which this is not one. The statute is conclusive of the question. There is no pretense that the wife obtained the goods as agent of her husband. Appellee was present, and assisted in selecting the goods himself. We are aware of no rule of law under which the wife of appellee could be permitted to testify in the case. *Reeves* v. *Herr*, 59 Ill. 81.

Other points for a reversal of the judgment have been urged, but it is not necessary to consider them, as this is fatal.

The judgment will therefore be reversed, and the cause remanded.

Judgment reversed.

THE PEOPLE, etc., for use of John F. Schuchert *et al.*

v.

CATHARINE PHELPS, Admx.

1. ADMINISTRATION—*whether money paid on life policy of insurance is assets for the payment of debts.* If a life policy of insurance is made payable to the party's "legal representatives," the proceeds thereof will be

assets in the hands of his executor or administrator, and subject to the payment of debts, the same as any other personal assets.

2. SAME—*claims must be paid pro rata.* An administrator must pay all claims presented and allowed, within the time limited by law, *pro rata.* If his account shows the payment of some creditors in full, to the prejudice of others, it should not be approved.

3. SAME—*no objection to allowance of claim that it is secured on real estate.* It is no objection to the allowance and payment of a claim against an estate that it is secured on real estate of the intestate. The personalty is the primary fund out of which all claims must be paid, and it must first be exhausted.

4. INSURANCE—*life policy may be made payable so as to exclude creditors.* It is competent, under the laws of this State, to make a policy of insurance on a person's life payable to his widow or heirs, to the exclusion of his creditors.

APPEAL from the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

This was an appeal to the circuit court from an order of the county court approving an account current of Catharine Phelps, administratrix of the estate of Benjamin F. Phelps, deceased, made in answer to a citation. On the hearing of the appeal, the circuit court affirmed the order of the county court. The grounds of objection to the account appear from the opinion of the court.

Messrs. HARTZELL, MORRISON & GORDON, for the appellants.

Mr. J. BLACKBURN JONES, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

In the account rendered, the administratrix omitted to charge herself with the amount of a life policy on the life of her intestate, which she had previously collected. According to our understanding of the law, the proceeds of the policy constituted funds in the hands of the administratrix,

to be administered the same as other assets belonging to the estate.

The policy, by its express terms, was payable to "the said Benjamin F. Phelps' legal representatives." The words "legal representatives," in the commonly accepted sense, mean administrators or executors. What construction shall be given to the phrase "legal representatives," depends upon the intention of the party using it. *Warnecke* v. *Lembca*, 71 Ill. 91.

It was competent, under our law, for the intestate to have made the policy payable to his widow or to his heirs, to the exclusion of his creditors; but this he did not do. He chose to make it payable to his "legal representatives," and, in this instance, the legal representative of the intestate is his administratrix. Had it been the intention the proceeds of the policy should go to the widow or heirs, to the exclusion of creditors, apt words no doubt would have been used to express that purpose; but no such intention is manifested. The term employed, "legal representatives," must be understood in its ordinary meaning, which is, administrators or executors, and can not, by construction in this case, be held to include the widow and heirs, to the exclusion of the administratrix.

The proceeds of the policy must, therefore, be regarded as other assets coming to the hands of the administratrix, and to be administered accordingly. The following cases are illustrative of this view of the law: *Wason* v. *Colburn*, 99 Mass. 342; *Stevens* v. *Warren*, 101 ib. 564.

The administratrix obtained credit for having paid in full claims of other creditors not previously allowed. It was proven the claims were just, and, having been presented to the administratrix within the time limited by the statute, she could, if the condition of the estate would warrant it, pay them, and afterwards have them allowed, which was done in this case. The error consists in paying them in full, to the prejudice of other claimants. This she could not do. Their claims had been presented, and allowed by the court, within

the time fixed by the statute, and hence they were entitled to their *pro rata* share of the assets with the other creditors of the estate.

It was no valid objection to the allowance of the claim of John C. Watt, that the indebtedness had been secured by the intestate, in his lifetime, on real estate. The personalty belonging to the estate is the primary fund out of which all claims must be paid, and must be first exhausted.

In the particulars suggested, the account of the administratrix was erroneous, and ought not to have been approved by the court.

The judgment will be reversed and the cause remanded.

Judgment reversed.

THE CITY OF GREENVILLE

v.

MATTHEW HENRY.

EVIDENCE—*relative weight of—positive and negative.* On the trial of an action against a city to recover for an injury received from a defect in a culvert, the court instructed the jury: "that positive evidence is entitled to more weight than negative evidence; and that if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if Henry Alfred and Mrs. Gibson swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury:" *Held*, that the instruction was objectionable, and not apt as an illustration, as it omitted the element of the reasonableness of the fact testified to.

WRIT OF ERROR to the Circuit Court of Bond county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was an action on the case, brought by Matthew Henry against the city of Greenville, to recover for personal and

other injuries, occasioned by a defective culvert alleged to have been within the city limits. On the trial the court gave the following, among other instructions, for the plaintiff:

"The court instructs the jury, that positive evidence is entitled to more weight than negative evidence; and that if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if Henry Alfred and Mrs. Gibson swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury."

Messrs. HENRY & FOUKE, for the plaintiff in error.

Messrs. MOULTON & CHAFFEE, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The question whether this culvert was within the corporate limits of the city of Greenville, and whether it had been out of repair a length of time sufficient to have enabled its authorities to ascertain its condition, were mooted points before the jury, and about which there was conflicting testimony. Under such circumstances we would not disturb a verdict, unless it was clearly against the weight of evidence, which can not be alleged of this verdict.

Objection is made to the first instruction given for the defendant in error. We think it was objectionable as given.

The proposition is not true, as stated. If a person, being in a room with others, should testify that a clock in the same room, and in good order, the hands of which pointed to "twelve," actually struck "forty," and the others, having a chance equally as favorable to see and hear the striking, should testify they did not hear it, the testimony of the latter should outweigh that of the single person, for the fact to

which he testified was neither reasonable nor probable. The instruction, as given, was not apt as an illustration, wanting the element of reasonableness or probability of the fact to which he testified. *Chicago and Alton Railroad Co.* v. *Gretzner*, 46 Ill. 74. But it could not have misled the jury, in view of the testimony before them.

There being no substantial error pointed out, the judgment must be affirmed.

Judgment affirmed.

MARY CLINGMAN *et al.*

v.

HENRY HOPKIE.

1. SALE UNDER JUSTICE'S TRANSCRIPT—*filed after death of the debtor.* The filing of the transcript of a judgment recovered before a justice of the peace, in the circuit court, after the death of the defendant, and the issue of an execution thereon, confers no right on the creditor to levy upon and sell lands of the deceased defendant, or to redeem from a prior sale as a judgment creditor; and a sale of land in either case will be void, and may be attacked collaterally.

2. ADMINISTRATION—*remedy of judgment creditors.* Where a judgment is not a lien on the land of the defendant at the time of his death, the creditor can only collect his debt in the due course of administration, and his judgment has no preference or priority over any other creditors holding ordinary demands.

3. SAME—*execution can not issue within one year, and then not without notice.* When a judgment is a lien upon the land of the defendant before his death, no execution can be issued thereon before the expiration of one year after the defendant's death, and not then without three months' notice to the executor or administrator, as required by statute, or without a revivor by *scire facias*. A levy and sale in violation of these requirements are void, and pass no title.

4. REDEMPTION—*effect of, by one having no right.* Where a redemption of land, sold under a decree of foreclosure, was made after the death of the debtor by a judgment creditor, whose execution was void, and who had no right to levy and sell under the same, and the redemption money was accepted and acted upon as valid by the prior creditor, it was *held*, that

the acceptance operated to extinguish the prior sale, the same as if the redemption had been properly made, and re-invested the heirs at law of the deceased debtor with the title to the land, and that they were not precluded from contesting the title claimed by such redeeming creditor, by sale under his execution.

5. CHANCERY JURISDICTION—*remedy at law.* The loss of a justice's transcript filed in the circuit court, under which a sale of land was made, and under which a party claims title, affords no ground for equitable relief against the prosecution of an action of ejectment against him, as the remedy at law is complete by motion, on notice, in the circuit court, to supply and restore the transcript.

WRIT OF ERROR to the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

This was a bill in chancery, filed by Henry Hopkie against Mary Clingman, Frederick Runge, Dorothea Rabe, and Bathine Runge, and Charles Schwear, her next friend, to enjoin the prosecution of an action of ejectment, instituted by Frederick Runge and Bathine Runge, by Charles Schwear, her next friend, against the complainant, for an 80 acre tract of land, and to correct the title. The opinion of the court contains a statement of the material and principal facts of the case.

Mr. THOMAS G. ALLEN, and Mr. LEVI DAVIS, JR., for the plaintiffs in error.

Mr. WM. HARTZELL, and Mr. J. PERRY JOHNSON, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears, that on the 1st of January, 1852, Frederick Runge was the owner of the northwest quarter of the northeast quarter of section 15, town. 5 north, range 8 west, and the east half of the northeast quarter of the same section. On the 20th day of that month, he and his wife mortgaged the same to John Walsh, to secure the payment of $650; that Walsh died, and his brother, James, was appointed adminis-

trator of his estate; that on the 5th of April, 1859, the administrator filed a bill to foreclose the mortgage, and at the April term of that year he obtained a decree of the circuit court for a foreclosure, and sale of the property. On the 9th of July, in the same year, the property was sold by the master in chancery under the decree, and was bid in by the administrator, and he received a certificate of purchase for the same.

On the 16th day of January, 1860, one Rabe obtained a judgment, before a justice of the peace, against Runge, for $92 and costs, which judgment was assigned to complainant and one Kenker; that on the 5th of July, 1860, Runge died, intestate, leaving appellants and others his heirs. On the 3d of September, 1860, complainant and Kenker filed in the office of the clerk of the circuit court a transcript of the judgment recovered by Rabe against Runge, and on the 7th day of that month an execution was issued on the transcript to the sheriff, and placed in his hands to execute, and it was on the same day levied on the lands sold under the decree; that on the 18th day of the month, complainant and Kenker paid to the master the requisite sum to redeem from the sale under the decree, and on the 26th the sheriff sold the lands, and complainant and Kenker became purchasers of the same, having bid the amount of their execution in addition to the sum paid by them to redeem; that on the 14th of December, 1860, one of the heirs of Runge conveyed her interest in the premises to complainant; that Kenker, on the 31st of January, 1861, assigned all of his interest in the certificate of purchase to Rabe, and on the 24th of April, 1863, complainant assigned his interest to Rabe, and he, on the same day, received a sheriff's deed for the lands; that on the 28th day of the same month, Rabe conveyed the 80 acre tract to complainant; that appellants commenced an action of ejectment against Hopkie to recover this 80 acre tract, and he thereupon filed this bill to restrain them from further proceedings in their action. On a hearing in the court below, a decree was rendered granting the relief prayed, from which this appeal is prosecuted.

The foregoing facts appear from the bill and answer, and we propose to consider them as proved on the hearing. They were found in the decree, but there is no certificate of the evidence heard on the trial, nor does the decree state what evidence was heard—whether by depositions, oral or documentary evidence. But as these defects could be supplied readily on another hearing, we choose to regard all of the findings of the court as sustained, and determine whether the bill presents a case for relief.

The first and all-important question is, whether the filing of the justice's transcript, after the defendant's death, conferred any rights on his creditors, whether they thereby became entitled to redeem from the sale under the decree, or whether the whole proceeding, and all that grew out of it, was not void and of no effect.

In the cases of *Welch* v. *Wallace*, 3 Gilm. 490, *Paschall* v. *Hailman*, 4 Gilm. 285, and *Turney* v. *Gates*, 12 Ill. 141, it was held, that where a judgment is not a lien on the land of defendant at the time of his death, the creditor can only collect his debt in due course of administration. All debts not secured by a lien on real or personal estate of a deceased debtor, are placed on the same footing. No preference is given to any claim not thus secured. Hence a creditor can not sue and recover a judgment against the executor or administrator so as to reach real estate of deceased, but all claims not a lien must be probated and paid from the general assets of the estate.

In this case, the judgment before the justice of the peace, as all know, was not a lien on this or other property. And to make it a lien by filing a transcript in the circuit court, after the death of defendant, would be the same in effect as a recovery against the administrator. Such a judgment would create no lien, nor does the filing of such a transcript. Neither could an execution thereon be levied on real estate or on personal property. The death of the debtor suspends all

proceedings for the collection of debts against the deceased, except in the mode pointed out in the Statute of Wills.

On the death of the debtor, his real estate vests in his heirs, and his personal estate in his executor or administrator, on the granting of letters testamentary or of administration, for the benefit of creditors and the distributees or legatees. It would, therefore, be an anomaly to hold that by recovering a judgment against the representative of the estate, the funds he holds in trust for creditors, distributees or legatees could be perverted to pay a single, but a preferred, creditor.

Again, when a judgment is a lien on the land of a debtor before his death, the statute has prohibited an execution from issuing within a year after the defendant's death; nor can it be issued after the expiration of that time, without three months' notice, as required by the statute, being given to the executor or administrator, or without a revivor by *scire facias*. And when an execution issues contrary to these requirements, and there have been a levy and sale, it has been repeatedly held that such a sale passes no title, but it is void, and may be attacked collaterally. *Pickett* v. *Hartsock*, 15 Ill. 279; *Brown* v. *Parker*, 15 Ill. 307; *Scammon* v. *Swartwout*, 35 Ill. 326; *Littler* v. *The People, ex rel. etc.* 43 Ill. 194. In this case these provisions of the statute were wholly disregarded, and the case falls within the principles announced in these cases.

These requirements are found in the same chapter which gives the right of redemption, and must be construed with the provision giving that right. The right to sell real estate, as well as for one judgment creditor to redeem real estate sold by another, is given and controlled entirely by the statute; and in exercising the right, the material provisions of the statute must be observed to acquire rights under the statute. Courts are powerless to create new and different provisions not embraced in the law. Whilst it would, no doubt, be eminently just to permit a redemption and sale in the manner attempted in this case, it is manifestly not sanctioned

by the statute, but, on the contrary, it seems to be most clearly prohibited.

It is no answer to say that the time for the defendant in execution to redeem had expired, when these creditors interposed to redeem as such. It does not matter that the heirs then had no rights in the premises at that time. The question is, did appellee, or those under whom he claims, acquire any right to the premises. And we have seen they did not, nor has he shown any since acquired.

But, conceding that the heirs had no such claim, still, when the money was paid to the officer, and the redemption money was paid to and accepted by Walsh, it operated to extinguish the sale, precisely as had the redemption been made before the expiration of the year from the date of the sale. No such right had matured, that the purchaser could not waive the time and permit a valid redemption; and such a redemption was made in this case. Nor does it change the effect of the act, that the money was paid by another than the heirs. It was paid to redeem, and was received as a redemption by the purchaser, and the parties have no power to give the transaction another form or direction.

Appellee having failed to show that he has a legal or equitable title, he had no right to restrain appellants from prosecuting their ejectment suit. Even if he had shown his sale regular and valid, the loss of the transcript by the circuit clerk would form no ground for equitable relief. It would only have required proper notice to have applied to the circuit court for leave to supply and restore the transcript, and on a proper showing the leave would be granted. The remedy at law is complete, and we can not see the slightest pretext for a court of equity taking jurisdiction.

The decree of the court below is reversed, and the bill dismissed.

Decree reversed.

JOHN S. PAUL

v.

AMOS BERRY.

1. PRINCIPAL AND SURETY—*no presumption as to several signing note.* Where several persons execute a promissory note, there will be no presumption that the first signer, or any other number less than the whole, is or are principal or principals, and the others co-sureties, but the fact rests in evidence *aliunde* to determine the relation they sustain towards each other.

2. SAME—*when held principal by ratification.* Where a father executes a promissory note, and signs his son's name thereto as principal, and procures others to sign as sureties, and the son afterwards ratifies the act by suffering judgment to go against him on the note, with full knowledge that it is claimed he is principal, he can not maintain a suit against the sureties for contribution.

3. SURETIES—*contribution.* Where it is established by proof that two or more persons are co-sureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved.

4. It is also well settled, that co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation, as to terminate the right of contribution.

5. PROMISSORY NOTE—*ratifying execution.* Where a person's name is signed to a promissory note without his authority, he may ratify its execution and acknowledge its binding validity upon him, and when this is done, his relation to the note will be precisely the same as if he had executed it personally.

6. EVIDENCE—*declarations as res gestæ.* If a father, executing a note, signs his son's name, and procures others to become sureties, what he says to the sureties at the time of their signing, as to the son being a principal with him, is competent evidence, as a part of the *res gestæ*, where the son afterwards ratifies the execution of the note. By such ratification, with a knowledge of the facts, the son makes the acts and declarations of the father his own.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

On the 30th of August, 1870, David D. Berry, John Berry, Amos Berry, John S. Paul, John Henry and Daniel G. Gil-

ham executed their promissory note in writing, whereby they jointly promised to pay the board of trustees of schools of township 4, range 9, in the county of Madison, etc., $600, with interest at ten per cent per annum, payable semi-annually, in advance, etc. After the maturity of the note, judgment was obtained against the makers, which was ultimately paid by Amos Berry.

The present suit is brought by Amos Berry against John S. Paul, to recover from him, as a co-surety on the note, his aliquot share of the amount which Amos Berry has paid on the judgment.

The suit was instituted before a justice of the peace of Madison county, whence, after judgment, it was appealed to the circuit court of that county. The case was tried in that court at its March term, 1875, when the jury, under instructions of the court, rendered a verdict for the plaintiff, for $148.51. Motion for a new trial was made by defendant, but overruled by the court, and the court thereupon gave judgment upon the verdict of the jury, to reverse which the defendant prosecutes this appeal.

The errors assigned question the rulings of the court below in allowing improper testimony to go to the jury, in excluding proper testimony offered by the defendant, in giving and refusing instructions, and in overruling the motion for a new trial, and rendering judgment on the verdict of the jury.

Mr. CHARLES P. WISE, for the appellant.

Messrs. METCALF & BRADSHAW, and Mr. HENRY O. BILLINGS, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

From the face of the note, the makers appear to be jointly liable to the payee as principals, and that the plaintiff was so liable, together with the other makers, was admitted by his

failure to make defense when suit was brought on the note, and this is all that is established by the record of the judgment in that case. As between the makers, there arises no presumption, simply from the note or the judgment, that the first signer, or any other number less than the whole, is or are to be treated as principal or principals, and the others as co-sureties, but it rests in evidence, to be introduced *aliunde* the note and judgment, to determine what relation they sustain towards each other. The burden is upon the plaintiff to prove that he is a surety, not only as between himself and his father, David D. Berry, whom he claims to be principal, but also as between himself and the defendant, for, notwithstanding where it is established that two or more persons are co-sureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved, it is well settled that co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation as to terminate the right of contribution. 2 Chitty on Conts. (11 Am. Ed.) p. 894, and note; *Moore* v. *Isley*, 2 Devereux & Battle's Equity, 372, 374; *Baggott and another* v. *Mullen*, 32 Ind. 332; *Harris* v. *Warner*, 13 Wendell, 400; *Barry* v. *Ransom*, 12 N. Y. (2 Kernan,) 464.

It is true, it was said by GRAY, J., in delivering what purports to be the opinion of the court in *Norton* v. *Coons*, 6 N. Y. (2 Selden,) 33, that, from the mere execution of the note, an implication arises that the sureties, as between themselves, are to share the burthen equally, and that parol evidence is inadmissible to contradict what is thus implied; but this view, as appears by the separate opinions of other members of the court, was not concurred in by a majority of the court, and it is expressly repudiated in the subsequent case of *Barry* v. *Ransom, supra*, where it is held parol evidence is admissible for the purpose of showing what relations several persons, who are sureties for a common principal, intended to sustain towards each other. And to the same effect is *Blake*

v. *Cole*, 22 Pickering, 97, and the *dictum* of Lord ELDON in *Craythorne* v. *Swinburne*, 14 Vesey, 160.

Plaintiff, in giving his evidence, denies that he received any part of the consideration for which the note was given; that he signed his name to the note, or that he had anything whatever to do with its execution. If this be true, he had a perfect defense, which he might have relied upon, had he chosen to have done so, when he was sued on the note. It was, however, competent for him to ratify the execution of the note and acknowledge its binding validity upon himself, and when this was done, his relation to the note was precisely the same it would have been had it been executed by him personally.

It would seem to admit of no doubt, even if he did not receive any portion of the consideration for which the note was given, he might voluntarily become a principal, and this, whether the note was signed by his father, who received the consideration, or not. If he might do this himself, he might do it by another; and being done by another, his subsequent ratification of the act would be equivalent to a prior authority in him whose acts he ratified.

The evidence of ratification of the execution of the note by the plaintiff is ample in the facts, that he suffered judgment thereon to go against himself, without attempting to make defense, and that he subsequently paid the judgment. Before judgment went against him, he was informed that the defendant and Gilham became sureties on the note, with the understanding that he was principal. He then denied that he was either principal or surety, and his subsequent acts of ratification were, therefore, with full knowledge that it was claimed he was principal, and not surety.

We think the evidence of what was said and done between David D. Berry, and the defendant and Gilham, when he applied to them to become sureties on the note, was competent. It was part of the *res gestæ*, and tended to show what the understanding and intention of the parties were, as between

each other, when they signed the note; and the plaintiff's ratification of his liability on the note, after knowedge of the position it was claimed he occupied toward the defendant and Gilham, makes the acts and declarations of his father, in obtaining their signatures, his own.

The judgment is reversed and the cause remanded.

Judgment reversed.

WILLIAM A. HOWELL *et al.*

v.

JONAH MORLAN.

1. JUDGMENT—*entering nunc pro tunc.* The entry of a judgment *nunc pro tunc* is proper when a judgment had been ordered at the proper term, but the clerk has failed or neglected to enter it upon the record.

2. BILL OF EXCEPTIONS—*presumption in respect to evidence heard.* Where the court orders the entry of judgment at a term subsequent to that at which the verdict is returned, as of the proper term, and the record shows that evidence was heard upon the motion, but the bill of exceptions fails to give the same, it will be presumed that the evidence justified the action of the court.

3. WHARFMAN—*liability for not obeying instructions as to whom goods are to be shipped.* Where grain was delivered to wharfingers, to be shipped to a certain party in New Orleans, where certain rates could be had, and, before shipment, they were notified not to ship to such party, but to another, which they neglected to do, but shipped according to the first direction, and the price of the grain was lost, in consequence of the insolvency of the consignee, it was *held*, that the wharfingers were liable to the shipper for its value.

APPEAL from the Circuit Court of White county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

This was an action of assumpsit, by Jonah Morlan, against William A. Howell, James W. Millspaugh and Charles Carroll, partners, to recover for the loss of a lot of oats. The opinion of the court gives the material facts of the case.

Messrs. BOWMAN & WASSON, for the appellants.

Messrs. CREBS & CONGER, and Mr. R. W. TOWNSHEND, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by appellee in the circuit court of Gallatin county, against appellants, to recover for a quantity of oats which were delivered to appellants, as wharfingers, to be forwarded, as claimed by appellee, to John T. Moore & Co., of New Orleans, which order appellants failed to observe, but shipped the oats to another party, who failed, in consequence of which the oats were lost.

The venue of the cause was changed to White county, where, at the November term, 1873, a trial was had before a jury, which resulted in a verdict in favor of appellee for $433.23.

The court overruled a motion for a new trial, but omitted to enter a formal judgment upon the verdict. An appeal was prosecuted to the June term, 1874, of this court, which was, on motion, dismissed, for the reason the record failed to show a final judgment rendered in the circuit court.

Appellee then served a notice upon appellants that application would be made at the November term, 1874, of the circuit court, to have the record completed and judgment entered upon the verdict of the jury. When the court convened, the motion was entered and allowed, and judgment rendered upon the verdict, to reverse which this appeal has been prosecuted.

It is conceded by appellants, in their argument, that if judgment had been pronounced on the verdict at the November term, 1873, but through the omission of the clerk, or for other cause, had not been entered upon the record, it would have been competent for the court, at a subsequent term, to have ordered the judgment to be entered *nunc pro tunc;* but they insist no judgment was pronounced upon the verdict at

the term it was returned by the jury, and that the court was powerless to act at a subsequent term.

The position of appellants is not, however, sustained by the record. The bill of exceptions embodied in the record, upon this point, is in the following language: "And now comes the plaintiff, by his counsel, and enters his motion herein to re-docket this cause, and to complete the record herein; whereupon, evidence having been heard in open court, it was ordered by the court that the clerk of this court enter the judgment of the court as *rendered* upon the verdict of the jury at the November term of this court, A. D. 1873, *nunc pro tunc.*"

From this clause of the record, it is apparent that judgment had been pronounced upon the verdict when it was returned by the jury, and the clerk had omitted to spread it upon the record. What evidence there was before the court that such was the fact, the bill of exceptions does not disclose; but the bill of exceptions affirmatively shows that evidence was heard, and, as appellants have failed to preserve the evidence in the bill of exceptions, we will presume it was sufficient to sustain the decision of the court.

The best evidence of the fact would have been the minutes of the judge, entered upon his docket, and, as we are left in the dark as to the character of evidence resorted to, we must presume the court heard the best evidence, and such as fully established the fact that judgment had been pronounced upon the verdict at the term it was returned into court.

If, then, it be true, as disclosed by the record, that judgment was entered upon the verdict at the term it was returned into court by the jury, and the clerk omitted to write up the judgment in the record, the court, at a subsequent term, undoubtedly had the power to order the judgment entered *nunc pro tunc.*

In Freeman on Judgments, sec. 61, the author says: "The entry of a judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court, but the clerk has

failed or neglected to copy it into the record." See, also, *Hagler* v. *Mercer*, 6 Florida, 721.

This in no manner conflicts with the doctrine announced in *Cook* v. *Wood*, 24 Ill. 295, and subsequent decisions on the same subject, in which it has been held that, where a judgment has been rendered and entered upon the record of the court, the term closed and court adjourned, the same court which rendered the judgment can not exercise any supervisory power over it at a subsequent term, except to amend, in a mere matter of form, on notice to the opposite party.

In the case before us, the court did not modify, alter or amend the judgment, but only, by order, upon notice to appellants, required the clerk to enter upon the record the judgment of the court, which the clerk had failed or omitted to record.

The next question presented arises upon the evidence, which it is claimed was not sufficient to authorize a recovery.

The oats in question were shipped by appellee, from Enfield, Ill., about the first of December, 1872, on the Springfield and Illinois Southeastern Railroad, to C. C. Twitchell, of New Orleans, in care of appellants, at Shawneetown. Appellants were, at the same time, directed not to forward the grain from Shawneetown until they could ship at freight rates of not more that 30 cents per 100 pounds.

While the oats were in the possession of appellants, at Shawneetown, and about the first of January, 1873, appellee testified he wrote a letter to Howell, Millspaugh & Co., appellants, and directed them to change the shipment of the oats from C. C. Twitchell to John T. Moore & Co. The letter was directed to appellants, at Shawneetown, stamped and placed in the hands of the U. S. mail agent, on the mail train going to Shawneetown, on the Springfield and Southeastern Railroad, which train would reach Shawneetown in about two hours from the time the letter was mailed.

Appellants, in order to rebut the presumption that they had received the letter, and had been notified to change the

shipment of the oats from Twitchell to Moore & Co., called James W. Millspaugh, one of appellants, who testified he had charge of the correspondence of the firm, and that he received no letter from appellee on the subject.

Under this evidence, it is urged, the jury were not justified in finding that appellants were notified to change the shipment of the oats.

It was a question of fact for the jury to determine whether appellants were notified, while they held the oats, to change the shipment from Twitchell to Moore & Co., and we are not prepared to say the finding upon this point was against the weight of evidence.

Had the three appellants, who composed the firm, been sworn, and had each one testified the letter was not received, then it might have been urged with more plausibility that the case made by the testimony of appellee was successfully met, but the mere fact that one member of the firm did not receive the letter, although he had charge of the correspondence of the firm, was not sufficient to overcome the evidence of appellee. For aught that appears, one of the other members of the firm may have received the letter, and failed to call the attention of the one in charge of the books to the fact.

We are, therefore, of opinion the evidence before the jury was sufficient to warrant them in arriving at the conclusion that appellants were notified to consign the oats to Moore & Co. This direction they failed to observe, and Twitchell, to whom they shipped the oats, having failed, the loss must fall upon them.

The law is so well settled that a consignor of goods has the right to direct a change in their destination, and that the carrier is bound to obey such directions, or be liable for all loss that may occur, that it is unnecessary to refer to authorities in support of the position. *Lewis* v. *The Galena and Chicago Union Railroad Company*, 40 Ill. 281.

Exceptions were taken to two instructions given for appellee, and to the refusal of the court to give one on behalf of appellants. Upon a careful examination of the instructions, we are satisfied the law involved in the case was substantially given to the jury.

The judgment of the circuit court will therefore be affirmed.

Judgment affirmed.

THE AMERICAN INSURANCE COMPANY

v.

JAMES H. PADFIELD *et al.*

INSURANCE—*breach of condition to keep house insured occupied.* A condition, in a policy of insurance of a dwelling house, that, if the house should become vacant and unoccupied, the policy should become void, is broken when the tenant occupying the same leaves the house two months before a loss by fire, and gives the assured notice of the fact, and no recovery can be had on the policy for the loss. The fact that the tenant has left a few articles in the building, and has not delivered the key to the owner, but with no intention of thereby holding possession, will not change the rule.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. J. M. BAILEY, Mr. J. I. NEFF, and Mr. M. W. WEIR, for the appellant.

Mr. WM. H. UNDERWOOD, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In this case, appellees sued out a writ of attachment against Martin Anderson, from the circuit court of St. Clair county. It was issued on the 28th day of February, 1872, and was served on the same day, by levying on lots 11 and 12, in Williams' first addition to the town of Lebanon, in

that county, and by summoning James R. Padfield, as garnishee.

On the first day of the following July, Anderson applied for and obtained a policy of insurance on a dwelling house on the premises. The policy was for insurance for five years from that date. Early in September following, the house was destroyed by fire, and, on the 20th of the same month, a further affidavit was filed in the attachment suit, that, by reason of the destruction of the house by fire, the property attached had thereby become insufficient to satisfy plaintiffs' debt, and thereupon an *alias* writ of attachment was issued, and served on appellant, as garnishee.

On the second day of April, 1873, a trial was had in the attachment suit, which resulted in a judgment in favor of plaintiffs for $1196.43, and costs of suit. Interrogatories were filed, which were answered by appellant, denying all indebtedness to Anderson and all liability on the policy.

At the September term, 1874, a trial was had upon the interrogatories and answer, by the court and a jury. A verdict was found for plaintiffs for $600. A motion for a new trial having been overruled, judgment was rendered on the verdict, from which this appeal is prosecuted.

The defense relied on consists of the breach of three conditions in the policy, *first*, that Anderson warranted the premises to be free from incumbrance when he made his application for insurance, when it was, at the time, subject to the levy of the writ of attachment; *second*, that the house had become vacant, and had so remained for about two months before, and was vacant at the time it was burnt, and that Anderson had notice thereof, whilst the validity of the policy was, by a condition therein, made to depend upon its continuous occupancy, and it provided that, if the house should become vacant and unoccupied, the policy should become void, and the assured should not be entitled to recover for loss; and *third*, the assured did not make and fur-

nish the proofs of loss, as required by the policy, within the time or in the manner specified.

In the view we take of this case, it becomes unimportant whether or not the levy of the attachment was an incumbrance until followed by a judgment, or whether the property seized was defendant's homestead, and not liable to attachment. Other questions control, and are decisive of the case.

The evidence incontestably shows that no person was residing in this house or had been for about two months prior to or at the time of the fire. The tenant in possession at the time the insurance was effected, testified that he had removed from the house that length of time before, and notified the assured of the fact, who requested him to lease it to some one else, but afterward countermanded the directions, and it had remained unoccupied until it was burnt. He says he did not consider that he had anything more to do with the house; that he was not occupying it or paying rent for it; he only had the key to deliver to Anderson when he came back from Missouri; that there was a table, a crib, and a straw tick in it, in the house when it burnt. A number of persons testified that the house was vacant.

We think there can not be the slightest room to doubt that the house was vacant and unoccupied when the fire occurred, and had been for the two months previously. A fair and reasonable construction of the language, "vacant and unoccupied," is, that it should be without an occupant—without any person living in it. This is the popular meaning of the language, as appears from the evidence. Several witnesses, knowing that no one was residing in it, testified that it was vacant; and so would the great majority, if not all persons, say the same thing. The language is not used in a technical, but in a popular sense. If the house had been situated when insured as it was when it was burned, and the assured had answered that it was occupied by a tenant, would any one doubt that such representation was false? Or, suppose assured

had owned the property in fee; had been, as he was, absent in Missouri, and had received the key from the tenant, and he had answered that he was occupying the house, although it had been situated as it was when it burnt, would any one suppose that the technical rule, that the fee draws to it, for some purposes, the possession, would have made the answer true, or that he could have thus answered his warranty that the house was occupied by him? We suppose no one would so contend. For some purposes, the law might regard the leaving of a few such articles in a house as carrying with them possession in their owner; but in such cases there must be an intention to thus take and hold possession; but here, there was no such intention by the tenant. On the contrary, he disclaimed all possession; but such possession is not occupancy, in its popular sense.

We think it clear, from the evidence in the case, that the house, when burnt, was vacant and unoccupied; that Anderson was notified of the fact, and acquiesced in it, and that the condition that it should remain occupied, was broken, and the policy became void, and the company are not liable to pay any portion of the loss.

This disposes of the case, and renders the discussion of other questions unnecessary.

The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

MICHAEL G. DALE

v.

JOHN G. IRWIN.

1. CHANCERY—*contested elections.* The proceeding to contest an election, under the act of 1872, is, to all intents and purposes, a chancery proceeding, and subject to all the rules governing the same.

Syllabus.

2. AMENDMENT—*of petition or bill to contest an election.* It is proper to permit amendments to the petition filed by a contestant of an election, under the act of 1872.

3. ELECTIONS—*of numbered and unnumbered ballots.* A numbered ballot should not be rejected in counting the votes at an election, merely because an unnumbered ballot is found folded within the same.

4. SAME—*of the place of holding an election.* The place of holding an election was fixed, by the proper authority, at a certain store. When the judges of election and the voters appeared at the store on the day of election, the proprietor forbid them the use of it. They then repaired to a building on the same side of the street, and not more than 50 or 100 feet from the store, and there the poll was opened, and the election proceeded without hindrance, all the voters knowing where the poll was opened, as it was readily seen from the store, and made manifest by the crowd going and returning therefrom. No fraud or improper motive was shown to produce this change, nor did any voter complain that he was deprived thereby of an opportunity to vote: it was *held*, in a proceeding to contest the election, there was no wrong done in holding the election at a place other than that origiually appointed.

5. SAME—*who are voters—college students—what is a "permanent abode."* The "permanent abode" prescribed by the Revised Statutes of 1874 as the criterion of the residence required to constitute a legal voter, does not mean an abode which the party does not intend to abandon at any future time. In the sense of the statute, a "permanent abode" means nothing more than a domicil, a home, which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it.

6. The undergraduates of a college, who are free from parental control, and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the town pursuing his usual avocation. It is, *pro hac vice*, the home of such students—their permanent abode, in the sense of the statute.

7. As a general fact, however, undergraduates of colleges are no more identified with residents of the town in which they are pursuing their studies than the merest stranger. Nor would the simple fact that such students paid a road tax in labor while in attendance at the college, have any weight in determining the question of residence, the law under which such road labor was bestowed not requiring residence to render the party liable, but simply inhabitancy.

8. SAME—*as to residence of paupers.* A party does not forfeit his residence in a precinct in which he was a voter, merely by becoming a county charge and an inmate of the poor house.

9. NATURALIZATION OF ALIENS—*jurisdiction of county courts.* The county courts of this State have jurisdiction to grant certificates of naturalization to aliens.

10. FORMER DECISION. The doctrine on this subject, as announced in *The Board of Supervisors of Knox County* v. *Davis*, 63 Ill. 405, is overruled.

11. NATURALIZATION OF ADULT—*effect upon illegitimate children.* A foreign born person, who was alleged to be illegitimate, came to this country as a member of the family of his reputed father, whose wife was the mother of the boy. The reputed father was naturalized while the alleged illegitimate child was an infant: *Held*, as the child was a member of his reputed father's family when his father was naturalized, and he an infant, that by virtue of the act of Congress he became naturalized, and that the question of his legitimacy would not be inquired into in a proceeding to contest an election.

12. REGISTRATION OF VOTERS—*of voting without registration or proof of right.* Where a person votes at an election without having been registered, and without any proof of right, if it does not appear he was challenged, or any objection made to his voting, the presumption must be that he was a legal voter, and so known to the judges of the election.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. JOHN M. & JOHN MAYO PALMER, and Mr. G. B. BURNETT, for the appellant.

Mr. LEVI DAVIS, Mr. CHAS. P. WISE, Messrs. GILLESPIE & HAPPY, and Messrs. KROME & HADLEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The record in this case shows that, at an election held at the several election precincts in the county of Madison, on the thirteenth of April, 1874, for county judge, there were three persons voted for, namely: appellant, M. G. Dale, appellee, John G. Irwin, and A. H. Gambrill. On canvassing the returns, by the clerk of the county court, aided by two justices of the peace of that county, it was certified by them that appellee, Irwin, had received two thousand and ninety-two votes, appellant, M. G. Dale, had received two thousand

and ninety votes, and A. H. Gambrill nine hundred and thirty-five votes. On this showing appellee received the certificate of election.

Whereupon appellant. Dale, on the 12th day of May, being within thirty days thereafter, filed in the office of the clerk of the circuit court of Madison county, a statement, in writing, in the form of a bill in chancery, verified by his own affidavit, alleging that he was duly elected to the office, and that appellee was not elected, and setting forth the points on which he would contest the election. The bill prayed that the defendant, Irwin, might be summoned to answer the statement in the bill, and that upon a hearing the court would decree appellant duly elected to the office of county judge.

The defendant was duly summoned to appear and answer the statement, and at the return term of the circuit court, it being the October term, 1874, defendant appeared and entered his motion to quash the petition, which motion was allowed. Whereupon, at the same time, the complainant and petitioner obtained leave to amend the petition, which was done, and a rule entered against the defendant to plead to the amended petition; whereupon, the defendant entered his motion to strike the amended petition from the files, which motion was disallowed.

The defendant, thereupon, filed his sworn answer to the amended petition, and he also filed exceptions to the opinion of the court, allowing appellant to amend his petition and in refusing to strike the amended petition from the files. Afterwards, at the same term, leave was granted appellant to amend his amended petition, which was done, and the same verified by his oath.

The defendant then entered a motion to strike the petition so amended from the files, which was disallowed, and exception taken. Thereupon, the defendant filed his sworn answer to the amended petition, to which there was a replication by complainant, and the cause heard on the original petition and amendments thereto, answer, replication and proofs.

The court found defendant duly elected, and decreed against the petitioner for the costs.

To reverse this decree this appeal is taken, and this finding and decree assigned as error.

We have been thus particular in setting out the proceedings in the circuit court, as appellee has made points upon them which it is important to notice.

No point is made on the order of the court allowing the petitioner to amend his petition after the same had been quashed, the subsequent order to amend being regarded as virtually setting aside the order to quash, and, though irregular, seems to have been acquiesced in by the defendant.

The ground assumed by the appellee, in his exception to the order allowing the petition to be amended, is, that this being strictly a statutory proceeding, the petitioner should be confined to the points made in his original statement or petition; that the proceeding being neither in chancery nor at the common law, the court had no power to allow amendments of any kind, but should be guided by the statute alone, and as no provision is made therein for amendments, the court was powerless to allow them.

This brings us to the consideration of the question made so prominent in appellee's brief and argument: what is the nature of this proceeding? The several sections of chap. 46, title "Elections," in force July 1, 1872, which we will cite, we think satisfactorily answer the question.

Section 113, of this chapter, provides that the person desiring to contest such election shall, within thirty days after the person whose election is contested is declared elected, file with the clerk of the proper court a statement, in writing, setting forth the points on which he will contest the election; which statement shall be verified by affidavit, in the same manner as bills in chancery may be verified.

Section 114 provides, upon the filing of such statement, summons shall issue against the person whose office is con-

tested, and he may be served with process or notified to appear in the same manner as is provided in cases in chancery.

By section 115, evidence may be taken in the same manner and upon like notice as in cases in chancery.

By section 116, the case shall be tried in like manner as cases in chancery.

By section 119, in case the contest is in relation to the election of some person to an office, the judgment of the court shall declare as elected the person who shall appear to be duly elected. And by section 123, in all cases of contested elections in the several circuit courts or county courts, appeals may be taken to the Supreme Court in the same manner and upon like conditions as is provided by law for taking appeals in cases in chancery from the circuit courts.

From these citations, the conclusion is reasonable that the proceeding to contest such an election is, to all intents and purposes, a chancery proceeding, and subject to all the rules governing them; and it was so held by this court in *Talkington* v. *Turner*, 71 Ill. 234.

Previous to this act of the General Assembly, this court had held in *Moore* v. *Hoisington*, 31 Ill. 243, that a court of chancery had no jurisdiction to inquire into the validity of an election; and in *Moore* v. *Mayfield*, 47 Ill. 167, that an appeal did not lie in a contested election case, as it was not such "a case" as contemplated by the constitution—that it applied only to an action at law or a suit in chancery, and this was neither. To obviate the results likely to flow from these rulings, this act was, doubtless, passed. The whole proceeding under this act of 1872, from its incipiency, by filing a statement verified by affidavit, followed by a summons against the defendant to appear and answer, to the final judgment, has all the incidents of a regular bill in chancery, and an appeal is allowed to the Supreme Court in the same manner and upon like conditions as is provided for taking appeals in cases in chancery from the circuit courts.

This view disposes of the exceptions taken to the decision of the court allowing the amendments to the original petition.

We can not think the position taken by appellee, as to the meaning and purpose of this act, tenable or just. If he is right in seeking to confine the contestant to the points contained in his original statement, great injustice might be done in many cases, and this case is one of them. The position is, as we understand it, that, within the thirty days after the result of the election is declared, the contestant must specify all the points on which he grounds the contest, and that if, after that time, the contestee shall admit the facts charged, which are sufficient of themselves to deprive him of his office, he can then attack the contestant's right to the office, on any ground deemed sufficient, and against which the contestant has no right to defend, except by traversing the averments of the answer. We think it plain, regarding the obvious intent and purpose of the statute, that a contestant, after stating the points of contest in the mode required by the act, can avail of any amendment or pleading to meet the tactics of his opponent, and bring before the court the real points of the case. As special replications are now out of use, the same object is effected by amendments to the bill, and suit them to the case, as contestant shall be advised. 2 Daniell's Chy. Prac. 968.

This was the course adopted by the petitioner, under the sanction of the court, and in this there was no error.

It now becomes important to notice the points of contest made by appellant, in his original statement.

Complainant averred, in his statement, or bill, as follows:

"Your orator has been informed, and verily believes, and so charges the fact to be, that, in the election precinct of New Douglas, on the counting of said votes, two unnumbered ballots were found in the ballot-box, at said election, each folded within a numbered ballot; that both of said numbered ballots were for your orator for said office, and that both of said num-

bered ballots, together with the unnumbered ballots, were thrown out and rejected by the judges of election in said precinct, and were not counted in the returns from said precinct; and that in each of the election precincts of Silver Creek, Marine, Madison and Collinsville, at the counting of said votes at said election, one unnumbered ballot was found in the ballot-box, folded within a numbered ballot, and that each of said numbered ballots was for your orator for said office of county judge; that the judges of election in each of said precincts threw out the said numbered ballots, together with the said unnumbered ballots, and did not count said numbered or unnumbered ballots in making up their returns as aforesaid; and your orator further avers, that the said numbered ballots so thrown out and not counted in the said precincts of New Douglas, Silver Creek, Marine, Madison and Collinsville, were not thrown out and rejected because of any excess of ballots over the names entered on each of the poll-books of said several precincts, or because they were cast by persons not entitled to vote, but your orator alleges that the said numbered ballots so thrown out and not counted as aforesaid, were improperly and unlawfully thrown out by said judges, and ought to have been counted for your orator; and that if said ballots so improperly and unlawfully thrown out had been counted, in making up said returns, as they should have been, your orator would have had a greater number of votes at said election, for said office, than said Irwin, and would have been entitled to the certificate of election."

This showing, *prima facie*, entitled the contestant to the certificate of election, and, if not controverted, such would have been the decree of the court. The votes so cast out, if counted for appellant, would have raised his aggregate to 2096, and one at the Bethalto precinct subtracted from appellee's vote, would have left to him but 2091, showing a majority of five for appellant, giving the election to him beyond all cavil.

The first and only important amendment made by the contestant, of his petition, under leave of the court, was, by inserting the allegation that the unnumbered ballots, enclosed in those numbered, cast at the New Douglas precinct, were also cast for him.

In the answer filed by appellee, on the 5th of November, being of the same October term, 1874, he neither admitted nor denied the fact of the two numbered ballots in the New Douglas precinct, and the single numbered ballot in each of the precincts of Silver Creek, Marine, Madison and Collinsville, were cast for the contestant, or that they were thrown out and rejected by the judges, and he denies, if, as alleged, the numbered ballots were unlawfully rejected, and had been counted for the contestant, in making up the returns, that contestant would have had a greater number of legal votes than the defendant, or that he would have been entitled to the certificate of election, nor if, from the sum total of defendant's vote, one vote counted for him by the judges at Bethalto precinct, when the same should not have been so counted, the result would not have been changed, if all legal votes cast for him had been returned and counted, and the illegal votes cast for contestant had been rejected.

The answer is, in scope and substance, this: True, five votes, at New Douglas precinct and the other precincts named, were cast for you which were not counted for you, and one vote counted for me at Bethalto precinct to which I was not entitled. On this showing, the certificate of election should have been given to you, but I will contest your right to the office, by showing you received illegal votes more than sufficient to determine the majority in my favor.

The defendant then, in his answer in support of the allegation of illegal votes having been cast for contestant, specifies the names and the precincts at which the persons named voted.

To meet this new phase of the case, appellant had leave to amend his petition, which he did, on the 17th of November,

1874, by again averring that appellee was not elected to the office, but that appellant was elected; that more votes were returned in favor of appellee, by the judges of the election in the several precincts named, than were cast by legal voters for appellee in such precincts, specifying the names of the voters and the precincts at which they voted.

In this amendment, appellant alleged that certain persons (naming them), in number, six, voted at the Edwardsville precinct for defendant, when three of them (naming them) were not residents of that precinct, and two of them (naming them) had not resided in the State for one year, and one of them, Charles Colter, was not twenty-one years of age; that certain persons (naming them), five in number, voted for the defendant in the first and second wards, election precinct of Alton, and that neither of them resided in that precinct, and that various other persons (naming them), seventeen in number, sixteen of whom voted for the defendant in Upper Alton precinct, who did not reside in that precinct, and one of them, L. G. Bigwood, had not resided in the State one year preceding the election.

As to the six persons named as having voted at the Edwardsville precinct for appellee, it is conceded by appellant there is nothing in the testimony to impeach the votes of four of them. As to the other two, John W. Buckley and Gotlieb Schmidt, it is in proof by Buckley himself that he was a resident and lived in Bethalto precinct, and that he voted at this election. He declined to state where he voted. Joseph Chapman, one of the judges of the election at the Edwardsville precinct, and well acquainted in the county, having lived in it forty years, and knew Buckley, thinks he voted—found his name on the poll-book, and there is but one person of that name in the county. It is not denied he voted for appellee. James Wilson also swears Buckley voted at Edwardsville. As to Schmidt, it is proved by Buckley he was a resident of Bethalto precinct, and, by L. Ebenhardt, that he voted at this election at the Edwardsville precinct. It is not denied

he voted for appellee. From Buckley's testimony, it is evident he knew he was not exercising the franchise at the proper place, as he declined stating where he voted, lest it might criminate him. So with regard to Schmidt. He knew, as he lived in Bethalto precinct, he was violating the law by voting at Edwardsville, and he knew the boundaries of the precincts, as the dividing line is marked by Indian creek, and neither of them had been registered as voters in that precinct.

But, passing this for the present, we will consider the more important questions presented by the defendant on the new assignment, or amendment, of the petition, and they are, the validity of the election held in the third and fourth wards of the city of Alton, and the legality of the votes of the students of Shurtleff College, who voted at the precinct in Upper Alton.

It appears, from the record, the city of Alton was one election precinct, established as such, by order of the county court, in 1847, and by another order, passed in 1861, the place of holding elections therein was fixed at the city buildings. Afterwards, two sets of judges were selected in this precinct, and, in September, 1870, it was ordered that the poll of the third and fourth wards should be held at the engine-house. By an order of court, at the October term, 1870, the place of voting in these wards was changed from the engine-house to Fuch's or Fox's store, on Second street.

It appears when the judges and voters appeared at Fuch's store on the day of this election, the proprietor forbid them the use of it. They then repaired to Athelem's barber shop, on the same side of Second street, and not more than fifty or one hundred feet distant from Fuch's store, and there the poll was regularly opened, and the election proceeded without hindrance, all the voters knowing where the poll was opened, as it was readily seen from Fuch's store, and made manifest by the crowd going and returning therefrom.

No fraud or improper motive is charged by appellee to

produce this change, and no voter complains that he was deprived thereby of an opportunity to vote. It seems to have been deemed necessary by the judges and voters, on being deprived the use of the store, that some other convenient place should be provided for the poll, and, rather than deprive three hundred and ninety-two voters of their privilege, we are disposed to hold there was no wrong done in holding the election at the barber's shop.

Upon the other point, the right of students at Shurtleff College to vote, this must be determined by the statute. Section 65 of chapter 46, title, "Elections," under the head, "Qualification of Voters," provides as follows: "Every person having resided in this State one year, in the county ninety days and in the election district thirty days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord 1848, or obtained a certificate of naturalization, before any court of record in this State, prior to the first day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States above the age of twenty-one years, shall be entitled to vote at such election." By section 66, it is declared, a permanent abode is necessary to constitute a residence, within the meaning of the preceding section. R. S. 1874, p. 460.

The question turns upon what is a permanent abode, and this must be determined by facts and intention.

The legislature, by this section, sought to establish a criterion of residence, by declaring that a permanent abode shall be such criterion. Now, what is "a permanent abode?" Must it be held to be an abode which the party does not intend to abandon at any future time? This, it seems to us, would be a definition too stringent for a country whose people and characteristics are ever on a change. No man in active life, in this State, can say, wherever he may be placed, this is and ever shall be my permanent abode. It would be safe to say a permanent abode, in the sense of the statute, means

nothing more than a domicil, a home, which the party is at liberty to leave, as interest or whim may dictate, but without any present intention to change it.

One who has a home in a town in this State is, by the laws of the State, liable to town duties, to be taxed on his personal property, to be enrolled in the militia, and placed on the jury lists and serve as juryman, and to be chosen to fill town or county offices, if of mature age and possessed of other proper qualifications, and he is entitled to all the privileges of the town, and to receive its support in the event of his becoming a pauper.

These students were undergraduates of Shurtleff College, subject to its rules and regulations, and, so far as the testimony shows, taking no part in town affairs, and paying no taxes, and not assessed on their personal property for taxation to aid in defraying the expenses of the town. Some of them paid a road tax in their own labor, the street commissioner demanding this, on the basis of a residence of ten days. The homes of some of them are in distant States, who have nothing to attach them to the town in which the college is situate. Others, who testify they are entirely free from parental control, and regard Upper Alton as their home, having no other to which to return in case of sickness or domestic affliction, are unquestionably as much entitled to vote as any other resident of the town, pursuing his usual avocation. It is, *pro hac vice*, the home of such students—their permanent abode, in the sense of the statute, as clearly so as that of any other resident. As a general fact, however, undergraduates of colleges are no more identified with residents of the town in which they are pursuing their studies, than the merest strangers, and should all the seats of learning in the United States be polled, not more than one student in twenty would be found to possess the proper qualification of a resident of the town.

Particularizing students who, we think, were not entitled to vote, not having a permanent abode in Upper Alton, the

place of their voting, we name, A. H. Post, G. W. Peters, J. W. Primm, I. D. Badger, S. E. Tyson, B. F. Simpson, E. E. Tyson, T. M. Stewart, H. W. Tate, E. T. Cassell, T. C. Coffee and J. F. Howard, in all twelve, who voted for appellee, and were not qualified voters, and their votes should not have been counted for him.

It is urged, as some of these students, Cassell, E. E. and S. E. Tyson, paid a road tax in labor, this should weigh in determining the question of residence. By the statute in force when this road labor was performed, residence was not a qualification, but simply inhabitancy. All inhabitants of the road district, between the ages of twenty-one and fifty, were required to perform road labor. This was not a tax, as this court held in *Town of Pleasant* v. *Kost*, 29 Ill. 490, and *Fox* v. *City of Rockford*, 38 ib. 451, and is not an element to be taken into the account, to determine the question of residence, as required by the statute.

There remains the question of the jurisdiction of county courts to grant certificates of naturalization to aliens. Of this we have no doubt. The act of Congress does not require that the court of record shall have a general common law jurisdiction, but only common law jurisdiction, a seal and a clerk. This the county courts had at the time the cases in question arose.

Reference is made to *Knox County* v. *Davis et al.* 63 Ill. 407, in which it was held county courts had not such jurisdiction. Further reflection and more mature consideration have satisfied us the views there presented on this question are not in harmony with the decisions of other courts on the same question, and the doctrine thereof is overruled. *The People* v. *McGowan*, 77 Ill. 644.

As to the votes of the paupers cast at the Edwardsville precinct, it is sufficient to say they are not claimed by appellant, save one, only, Richard Crayse. He was an inmate of the poor house at the time he voted, but the proof is sufficient to show that, previous to his becoming so, his residence

was Edwardsville, and this he did not forfeit by becoming a county charge.

We have now disposed of all the controverted points in the case. What remains is mere matter of compilation. It is very apparent appellant made out his case in his original statement of points, and the only inquiry is, is the result changed by any matter presented by appellee, considered in connection with the amendments to the petition? Having made out his case against appellee in the first instance, appellant should have had the judgment of the court in his favor. The ballots given to appellant at New Douglas, Silver Creek, Marine, Madison and Collinsville, and thrown out by the judges because they were folded each with another ballot not numbered, and which was for appellant also, and counting one less for appellee at Bethalto precinct, and which he admits should be done, the state of the polls showed a clear majority for appellant, 2096 against 2092 for appellee.

The real questions are, under the principles we have announced, how many of these 2096 votes, cast for appellant, are illegal, and how many of the 2092 cast for appellee are in the same category. But first, there must be added to appellee's score, one vote at Omphghent, and one at Troy precinct, and one at Venice, the vote of Black; the first two for the same reason, that the votes were numbered and cast out because they were folded each with a ballot not numbered; and the latter, because the proof shows he was a registered voter at Venice precinct, had voted unchallenged, and his ballot afterwards taken from the box by the judges and not counted for the appellee. The poll would then stand, 2096 for appellant, 2095 for appellee.

Now as to the illegal votes. Appellee challenges forty-seven, viz: ten in Collinsville precinct, ten in Edwardsville precinct, six in New Douglas precinct, one in Troy and one in St. Jacob's precinct, six in Omphghent precinct, two in the Foster precinct, one in Greenwood and one in Monticello precinct, two in Venice precinct, one at Alton precinct, two at

Alhambra precinct, one at Highland, two at Worden and one at Marine precinct. Their names are given.

Of those challenged at Collinsville, two of them, namely, Coombe and Hewitt, voted for appellee, and the same is the case of Poos, in Worden precinct. Rourke testified his residence was Collinsville, and had resided there since March, 1871. He had a family there from that time on; went to Abbeyville, in St. Clair county, for the winter, with the intention of returning to Collinsville; remained at Abbeyville two or three months, with his family, considering it as his residence, until the house in which he was living burned down; he then returned to Collinsville January 29, 1874.

It can hardly be maintained this man was a resident of Madison county ninety days before the election, and was a legal voter. This challenge should be allowed. William C. Hadley was properly challenged. His residence was Jackson county. He changed it to Madison county, but not ninety days before the election. This challenge must be allowed. We fail to perceive any ground of challenge of the others.

Of those challenged at Edwardsville, it is admitted that Collins, Shay, Dolt and Young were not residents of the precinct, and the last named was not a citizen of the United States, nor within any of the saving provisions of the constitution. We perceive no objection to the remaining five.

Of those challenged at New Douglas precinct, one of them, Brown, voted for appellee. It is claimed, as the others voted without having been registered, and without any proof of right, their votes are invalid. It does not appear these voters were challenged, or any objections made to their voting, and the presumption must be they were legal voters, and so known to the judges of the election.

Reeder, challenged at Troy precinct, was a legal voter. The evidence fully satisfies us on that point. We perceive no objection to David Waters, who voted at St. Jacobs.

Of those challenged as voting at the precinct of Omphghent, we perceive no objection to any of them, unless it be to the right

of Henry Ruckle. His case is a peculiar one, and though he may be illegitimate, he came to this country as a member of John Ruckle's family, whose wife was his mother, and who was naturalized whilst Henry was an infant. John Ruckle is his reputed father, and the husband of his mother. We are inclined to hold, as he was a member of his reputed father's family when his father was naturalized, and he an infant, that, by virtue of the act of Congress, he became naturalized. The real paternity of reputed children of naturalized persons is hardly a fit subject for judicial investigation in a controversy of this nature. Of the other persons challenged, they were naturalized by the county court, and thus became citizens of the United States.

Of those challenged at the other precincts named, we find nothing to disqualify them. There may be some doubt as to the qualification of Charles, but in view of his mother's testimony, we are inclined to hold he was a qualified voter.

Six votes must be deducted from appellant's total, leaving him 2090 votes, against 2095 for appellee.

But appellant insists that, at Edwardsville precinct, two votes were given to appellee by resident voters of Bethalto precinct, namely, John W. Buckley and Gotlieb Schmidt. We have remarked on these cases, and are satisfied they were not legal voters at the Edwardsville precinct, and that they did not exercise the franchise innocently, as the boundary between the Edwardsville and Bethalto precincts is marked for some distance by a water course known as Indian creek. The act of voting out of the proper precinct was a violation of law, and no profit should be derived from it to the party voting, or to any one else. These votes deducted from appellee's total leaves him 2093, from which is to be deducted the votes of twelve students above named, of Shurtleff College, voting at the precinct of Upper Alton. This would give to appellee 2081, against 2090, to which appellant is fairly entitled.

There are ten other votes challenged by appellant as illegal, and cast for appellee, four of them, namely, Frank Neider-

corn, Russell Wilson, John Forsyth and James Kimel, voted at Bethalto precinct. The first named was a resident in the precinct of Upper Alton, where alone he had a right to vote, and Wilson, the proof shows, had not resided in the county ninety days next preceding the election, both violating the law knowingly. The others—James Kimel was a Swede; came to this country when twenty-five years of age, and had not been naturalized; John Forsyth was a native of Scotland, and emigrated to this country in 1870, then about twenty-five years of age, and has never been naturalized, as he himself testifies. Herman Astenmier, who voted at the Collinsville precinct for appellee, was, at the time of the election, a resident of Edwardsville precinct, and therefore not qualified to vote at Collinsville. So with regard to Charles Hinrich, who voted at Troy precinct for appellee, being, at the time, a resident of Marine precinct. These votes, taken from appellee's total, leave to him 2075 votes, against appellant's 2090, as above shown. There are other votes challenged by appellant as illegal. L. G. Bigwood is one. He had removed to Arkansas, doing business there for more than two years. We are inclined to hold he did not become a voter on his return, not being a resident of the State one year next preceding the election. G. A. Engelman is shown not to have been naturalized. He was a native of the Kingdom of Hanover, coming to the United States, with his father, in 1845, and to this State in 1867. His father was not naturalized, nor was this man, as appears by his own admission. James Demick, who voted for appellee at Monticello precinct, was, at the time, a resident of Upper Alton precinct. His vote should not count. George Bartlet was not entitled to vote at Venice precinct, being a resident of Edwardsville precinct. As to J. Milton Edwards, who voted at Monticello for appellee, the weight of the testimony is, he had no residence there, nor in this State, but was a resident of Wisconsin. Here are five votes counted for appellee to which he is not entitled, which, deducted from his total as above, 2075, leaves

to him but 2070 votes to which he has a legal claim. Deducting this total from 2090, which appellant can fairly claim, there is shown to be a balance in his favor of twenty votes, which entitles him to the certificate of election.

After a careful examination of the record, and a full consideration of the arguments, the above is the conclusion we have reached.

To recapitulate, appellant is entitled to claim 2090 votes as legally cast for him by qualified voters of the county. Appellee is entitled to claim 2070 votes, as legally cast for him by qualified voters. The difference, twenty, is the majority appellant can rightfully claim over the appellee, and to him should the certificate of election be granted.

The court, in deciding the certificate should be granted to appellee, and that he was duly elected, and in dismissing appellant's bill at his costs, erred, and for the error the judgment must be reversed, and the appellant must be declared duly elected to the office of county judge, and it is so ordered and declared.

Judgment reversed.

EDWARD SHEPARD

v.

NUNNA RINKS.

1. PAROL PARTITION—*whether binding on the parties.* A parol partition of land between tenants in common, carried into effect by possession taken by each party of his respective share according to the partition, will be valid and binding on the parties.

2. SAME—*what constitutes such a partition.* One of two tenants in common of land sold and conveyed by warranty deed one-half the premises, as an entirety, to a stranger. Subsequently, the same party, as the attorney in fact of his co-tenant, contracted to sell the remaining half, and that sale was consummated by the principal executing a deed to the purchaser for such remaining half, the party making the sale being present at the execution of the deed and signing his name as a witness thereto. This

disposition of the land seems to have been acquiesced in by the respective co-tenants for nearly thirty-eight years, when he who first conveyed brought ejectment against a remote grantee of his co-tenant to recover an undivided half of the half of the land which the latter had so conveyed: *Held*, that, upon the facts, there was at least a parol partition of the land between the tenants in common, each taking the portion so disposed of by him, so that the defendant in ejectment was not guilty of unlawfully withholding the possession from the plaintiff.

APPEAL from the Superior Court of Cook county; the Hon. J. MCROBERTS, Judge, presiding.

Messrs. MCDAID & WILSON, for the appellant.

Mr. E. S. BRAGG, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of ejectment, commenced on the 19th day of May, 1874, by Edward Shepard, against Nunna Rinks, to recover the possession of the undivided half of the west half of the south-east quarter of section 27, township 38, range 4, in Cook county, in this State. The judgment in the court below was for the defendant, from which the plaintiff appealed.

The facts, as we understand from the evidence, are as follows: Hartman Markoe and Edward Shepard purchased from the United States, as tenants in common, the south-east quarter of section 27, township 38, range 4, in Cook county, Illinois.

On the 8th day of September, 1836, Edward Shepard sold and conveyed by warranty deed to Maurice Wakeman the east half of the south-east quarter of said section. This deed conveyed the land as an entirety, and was recorded in Cook county, October 14, 1836.

Shepard became the attorney in fact of his co-tenant, Markoe, and contracted to sell, on behalf of Markoe, the west half of the south-east quarter of said section to Edward Reid. Markoe, in the fulfillment of that contract, conveyed

by warranty deed to Reid, November 29, 1836, the west half of the south-east quarter of the section, as an entirety, for $3000, Shepard being present and signing his name as a witness to the deed. This last deed was recorded in Cook county, May 21, 1839. For anything that appears to the contrary, this disposition of the quarter section by the respective cotenants was acquiesced in from the date of the deeds down to the commencement of this action. The defendant occupies and holds the west half of the south-east quarter of said section 27 under the title from Reid, as there is evidence tending to show. Under such occupation, the west half of said quarter was fenced in 1868. The evidence as to Shepard contracting to sell the west half, as the attorney of Markoe, we find in Markoe's statement of such fact, contained in a bill in chancery of his, which the plaintiff introduced in evidence.

The deed from Markoe was shown by an abstract of title, which was introduced in evidence, and parol evidence was given of the deed from Shepard, and objection was taken to these modes of proof.

We are of opinion that there was a sufficient foundation laid to warrant the introduction in evidence of the abstract, and of the parol evidence, although appellant makes the point that there was not.

The plaintiff seeks to recover the undivided one-half of the land which Reid bought of Markoe, claiming that there was no partition of the land between himself and Markoe, so as to pass the legal title.

The conclusion, from the facts, must be, that there was at least a parol partition of the quarter section between Shepard and Markoe, the former taking the east half and the latter the west half.

It is the well settled doctrine, at least of some courts, that a parol partition of land between tenants in common, carried into effect by possession taken by each party of his respective share according to the partition, will be valid and binding on

the parties, as their titles are distinct, there being but an unity of possession, and the object of the division being to ascertain the separate possession of each. *Jackson* v. *Hardee*, 4 Johns. 202; *Wood* v. *Fleet*, 36 N. Y. 499; and to the like effect, *Eaton* v. *Tallmadge*, 24 Wis. 217, and see *Tomlin* v. *Hilyard*, 43 Ill. 300; *Vasey* v. *Board of Trustees, etc.*, 59 id. 188.

In 1 Washb. Real Prop. 430, it is laid down that no parol partition can be effectual unless accompanied by deeds from one co-tenant to the other, inasmuch as the Statute of Frauds applies to such cases, citing, in support, *Porter* v. *Hill*, 9 Mass. 34, *Porter* v. *Perkins*, 5 id. 232, *Snively* v. *Luce*, 1 Watts, 69, *Gratz* v. *Gratz*, 4 Rawle, 411, *Gardiner M'g Co.* v. *Heald*, 5 Me. 384, *Dow* v. *Jewell*, 18 N. H. 354. The author says further, however, immediately following: "But although a parol partition between tenants in common may not, for the reasons stated, affect the legal title of the several owners, where it is followed by a possession in conformity with such partition, it will so far bind the possession as to give to each co-tenant the rights and incidents of an exclusive possession of his purparty;" and it is further said, exclusive possession by one tenant in common of a particular part of the estate, accompanied by a denial of his co-tenant's right of possession in the part thus occupied, may grow into a legal presumption of partition having been made.

There is here exclusive possession of this west half under title derived from the co-tenant Markoe, as the evidence tends to show. His warranty deed of the entire west half amounted to a denial of his co-tenant's (Shepard's) right of possession therein, which is strengthened by the evidence tending to show Shepard's co-operation therein; and Shepard's warranty deed of the whole east half was a virtual assertion that his right of possession was confined to that half, and that he had none in the west half.

The evidence stated, affords ground of inference that the

defendant's possession was a lawful one, under the assent of the plaintiff, given for a full consideration.

We are of opinion that the jury were warranted in finding, from the evidence, that the defendant was not guilty of unlawfully withholding the possession of the premises from the plaintiff.

The judgment will be affirmed.

Judgment affirmed.

JOHN H. WEIR
v.
THE PEOPLE, use, etc.

1. ADMINISTRATION—*whether money coming to hands of an administrator, who is also executor of sole distributee, is held as executor or as administrator.* Where the administrator of an estate qualifies as executor of the will of the sole heir and distributee of his intestate, the receipt of money by him as administrator, after the debts of the intestate are paid, will be regarded as paid to himself, as executor, without any order of court for that purpose, or the giving of any refunding bond, and therefore, after his death, the surety on his bond, as administrator, will not be liable for such money.

2. After the death of the administrator and executor, and the appointment of an administrator *de bonis non* of the estate of which he was executor, it is not in the power of the administrator *de bonis non*, by settling with the sureties on the executor's bond, to affect the rights of the surety on the bond of the same person, as administrator, and thereby change the liability that rested upon the sureties in the bond of the deceased party as executor, to the surety on his bond as administrator.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

This was an action of debt, brought in the name of the People of the State of Illinois, for the use of Christina Wolf, Edward Wolf and Susan Wolf, against John H. Weir, surety, upon the bond of Frederick T. Krafft, deceased, as administrator of the estate of Jacob Bitzer, Jr., deceased. The material facts of the case will appear in the opinion of the court.

Messrs. METCALF & BRADSHAW, and Messrs. GILLESPIE & HAPPY, for the appellant.

Messrs. DALE & BURNETT, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

On January 30, 1868, Jacob Bitzer, Jr., died intestate, leaving personal property. One Frederick T. Krafft was, on the 6th day of February, 1868, appointed administrator of the estate, and gave his administrator's bond in the usual form, upon which John H. Weir, the appellant, was surety.

The sole heir and distributee of Jacob Bitzer, Jr., was his father, Jacob Bitzer, Sr., who departed this life on the 22d day of March, 1868, leaving a last will and testament, wherein he made Christina, Susan, and Edward Wolf, the persons for whose use this suit is brought, his general residuary legatees, and appointed the said Krafft his executor, who qualified and acted as such, executing his bond as executor, with different sureties, on the 15th day of April, 1868. In April, 1871, said Krafft also departed this life.

No account was ever rendered by Krafft of his actings and doings, in regard to the estate of Jacob Bitzer, Jr. The amount of the sale bill filed by him of the personal estate was $974.25. The sale was made on a credit of nine months.

This suit was brought against Weir, the security on the administrator's bond given by Krafft as administrator of the estate of Jacob Bitzer, Jr., and was brought for the use of Christina, Susan, and Edward Wolf, legatees under the will of Jacob Bitzer, Sr., to recover the balance of the amount that came into the hands of Krafft after the payment of the debts of such estate, they appearing to have all been paid. The plaintiffs recovered a verdict and judgment for $700 damages, and defendant appealed.

The main question is, whether this surety, John H. Weir, is liable on the administrator's bond given by Krafft as administrator of the estate of Jacob Bitzer, Jr., for the payment

to these legatees, under the will of Jacob Bitzer, Sr., of the residuary part of the personal estate of Jacob Bitzer, Jr., after the payment of debts, that came into the hands of Krafft.

There is no question made, that the amount of the sale bill of the personal estate of Jacob Bitzer, Jr., came into the hands of Krafft. This money, less the debts of the estate, belonged to the distributee of the estate. At the time it so came into the hands of Krafft, he was the administrator of the estate of Jacob Bitzer, Jr., and also the executor of the estate of the distributee, Jacob Bitzer, Sr.

As such executor, he was entitled to have the money paid to him, and no further act of paying or receiving was required in order to the payment of the money to him as executor. It was already in his hands. The receipt of the money by him as administrator of the estate of Jacob Bitzer, Jr., was *ipso facto* the payment of it to himself as executor of Jacob Bitzer, Sr. At least we think this must be accepted as the legal consequence, if, at the time, he was entitled to the receipt of the money as such executor, and there was no application of it otherwise, and there does not appear to have been.

It is objected that the distributee was not entitled to the receipt of the money, because there had not been a refunding bond given, nor any order of court for distribution made.

The 129th section of the Statute of Wills provides, that "administrators shall not be compelled to pay legatees or distributees, until bond and security be given by such legatees or distributees to refund the due proportion of any debt which may afterward appear against the estate, and the costs attending the recovery thereof. Such bond shall be made payable to such executor or administrator, and shall be for his indemnity, and filed in the court of probate." And in *Newbrecht* v. *Santmeyer*, 50 Ill. 74, it was held that heirs were not entitled to their distributive shares, until an order of distribution was obtained. The present would be a case where a refunding bond would, of necessity, be dispensed with, as Krafft, as

executor of Jacob Bitzer, Sr., could not give a bond to himself as administrator of the estate of Jacob Bitzer, Jr.

The People v. *Admire*, 39 Ill. 252, is an authority that there may be cases where no refunding bond would be required.

As respects any order of court for distribution, if there was none, there properly should have been, and probably would have been one had Krafft performed his duty in exhibiting yearly, to the court of probate, accounts of his administration for settlement, as required by section 123 of the Statute of Wills. The 124th section of the statute makes "it the duty of the court, upon each and every settlement, as so provided for, to make an order for the payment of claims allowed." Another section provides, that whenever it shall appear that there are sufficient assets to satisfy all demands, the court shall order the payment of all legacies. Had the administrator rendered his accounts for settlement, as it was his duty to do, there would doubtless have been made by the court an order of distribution of the residue, after payment of debts, as it would seem to be of course, Jacob Bitzer, Sr., being the sole distributee, and there could be no other claim to such residue; but there was never any administrator's account whatever, ever rendered. It would not have been permitted, we think, to Krafft himself to claim an advantage, and have resisted the payment over of this money, on account of the lack of that, the absence of which we must suppose to be owing to the non-performance of duty on his part. As the money should have been paid to the distributee, or his representative, it might have properly been so paid voluntarily, without any order of court. And there would be somewhat of the same difficulty, here, in the obtaining by the party in interest of an order for distribution, as in the giving of the refunding bond: that, of one being the *actor* against himself in taking a proceeding to obtain an order in his own favor against himself.

We are of opinion that the want of either a refunding bond or of an order of court for distribution, should not, under

the circumstances of this case, operate to deprive the payment of the money to Krafft as administrator of Jacob Bitzer, Jr., of its character of a receipt of it by him as executor of Jacob Bitzer, Sr.

Our conclusion, then, is, that after the payment of this money to Krafft, it was in his hands as executor of Jacob Bitzer, Sr., as assets of his estate, and that, so far as respects this money, the obligation under the administrator's bond had been discharged, by the payment of the money to the person entitled to receive it; and that the executor's bond, if either, is the one to be here pursued, and not the administrator's bond.

M. G. Dale testified, as a witness, that he, after the death of Krafft, was appointed administrator *de bonis non* of the estate of Jacob Bitzer, Sr., and that there was a settlement had with Henry Ritter, one of the securities on the executor's bond of Krafft; that Ritter paid over to the heirs or devisees of Jacob Bitzer, Sr., the sum that they accepted as the balance due them from Krafft, as the executor of Jacob Bitzer, Sr.; that he acquiesced in it, and considered it a settlement of the estate of Jacob Bitzer, Sr., with the securities, and that the property of the estate of Jacob Bitzer, Jr., of which Krafft was administrator, was in no way included in that settlement.

Whether or not this transaction testified to may have embarrassed any remedy upon the executor's bond, we do not conceive that it could have any effect upon the legal rights of this surety upon the administrator's bond. His rights are to be determined according to what the law pronounces to be the legal effect of the acts of Krafft in his lifetime. And it would not be in the power of these persons, after the death of Krafft, by anything they might do, as between themselves, to affect such rights.

The assessing, then, of any damages in respect of this money to which these legatees were entitled, we regard as error, and the judgment must be reversed and the cause remanded.

Judgment reversed.

Syllabus.

St. Louis, Vandalia and Terre Haute R. R. Co.

v.

Margaret Dunn, Admx.

1. Negligence *in railroad—omission to give signal, and running at too high a rate of speed in a city.* A person was crossing a street in a city, after night-fall, in which there were four railroad tracks, upon which trains were passing at short intervals at all hours of the day, and just as he was stepping upon the farthest track in the direction he was going, he was struck by an approaching train, and injured to such an extent that he soon afterward died. The company employed a watchman, whose duty it was to warn persons crossing the tracks of danger from approaching trains, and, in view of the character of the thoroughfare, such a precaution was proper and necessary. But, at the time of the accident, the watchman was not present attending to his duty, and the train was running at a much higher rate of speed than was allowed by an ordinance of the city, and it was a question whether a bell was rung or a whistle sounded upon the engine: *Held*, under the circumstances, an omission of any one of the duties mentioned would constitute gross negligence on the part of the company.

2. Contributory negligence. Upon a review of the facts in this case, it is *held*, there was no such contributory negligence on the part of the person injured as would relieve the company of liability. If he saw the head-light upon the locomotive, in the darkness, and in the absence of any signal or warning, either from the watchman or from the bell or whistle, he would probably be unable to discover that it was in motion, or if he saw the engine approaching, he had the right to suppose it was not moving at a rate of speed greater than was proper at that time and place, and to regulate his own conduct accordingly. The omission of proper precautions by the company would, under the circumstances, tend to relieve the party from the charge of negligence on his part.

Appeal from the Circuit Court of St. Clair county; the Hon. William H. Snyder, Judge, presiding.

Mr. Wm. H. Underwood, and Mr. John B. Bowman, for the appellant.

Mr. A. J. P. Garishee, Mr. Wm. G. Kase, and Mr. Wm. H. Bennett, for the appellee.

Mr. Justice Walker delivered the opinion of the Court:

Appellee brought an action on the case, in the St. Clair circuit court, against appellant, to recover damages for negligently causing the death of her husband. It appears that appellee and her husband, with their two children, on the 10th day of March, 1872, left their home, in East St. Louis, about noon, to visit an aunt of appellee residing in St. Louis, Mo., and they spent the afternoon there. At about 5½ o'clock in the afternoon, they started on their return home, appellee carrying her younger child, and her husband the older. At the Mississippi river they were detained some time for the ferry-boat to cross over. On landing on the east side, they started and reached the street car line, but missed the cars. They then started to walk from there to their home, and, whilst crossing Christy avenue, the husband, some distance in advance of appellee, where there were four railroad tracks in the street, passed the watchman's house, used by him whilst on duty, and, as deceased stepped on the most easterly of the four tracks, a passenger train came around on the curve, from the round house, and struck and ran over him, cutting off his legs and otherwise injuring him, from which he died at about 9 o'clock that evening. The leg or foot of the child which he was carrying, was cut off, and, after lingering a couple of weeks, it also died.

On the last trial before the court and a jury, a verdict was found for plaintiff, and, after overruling a motion for a new trial, the court pronounced judgment on the verdict, and defendant prosecutes this appeal.

This was the last of five trials in the court below, all of which, but one, resulted in favor of plaintiff, and in that the jury were unable to agree.

Appellee claims that the company was guilty of negligence that renders it liable for damages. But the company insists that deceased was guilty of such negligence on his part as should preclude a recovery.

It is insisted that appellant did not ring a bell or sound a whistle; that the train was running at a greater rate of speed than was permitted by the ordinance of the city; that there was no watchman on duty to warn deceased of danger at the crossing of the street where he was killed. On all of these questions there was a conflict of the evidence, such as could only be correctly determined by seeing and hearing the witnesses testify. The jury had that opportunity and advantage, and have found all or some of these issues in favor of appellee. That the flagman was not at his post, and in the performance of his duty, we think the evidence preponderates, and warranted the finding on that question.

If, then, a bell was not rung, a whistle not sounded, or the train was running at an unauthorized rate of speed, or the flagman was not on duty, and failed to give the deceased proper warning, the omission to perform either of these acts would be negligence in the company. At such a time, and in such a place, it would be gross negligence to omit the performance of either of these duties, and if the jury found that either was omitted, then the judgment should be sustained. The company was operating a dangerous machine in a populous city, and on a thoroughfare at an hour of the day when the engineer and other officers of the company must have known it would be thronged with people. Being acquainted with the place, and, no doubt, aware of the fact that persons thronged the place in passing over its track, it should have been on its guard, and have scrupulously observed every duty imposed upon it, for the safety of the people. It was so public, and so much used, that a watch or flagman's house had been erected, and such an officer appointed to warn persons of danger. We may, therefore, infer that it was a place of very great danger, or this precaution would not have been necessary. It was not supposed that persons would or ever could use this thoroughfare in conjunction with these railroad tracks occupying the street, without constant risk and great danger, and hence it became necessary that this further pre-

caution should be taken to secure their safety. The tracks were at the terminus of these roads leading into a great commercial city, and trains were necessarily passing, one or the other way, every few minutes, at all hours of the day.

The very fact that a flagman was deemed necessary, and was employed, shows that the caution usually required of persons crossing railroads at other places would be insufficient to protect them from danger. Hence the employment of other and greater means of safety, in a flagman, whose duty it was to look out for passing trains, and to warn persons and prevent them from incurring approaching danger. Were the ordinary precautions required of persons crossing railroad tracks sufficient, then such an officer would be wholly useless. But we regard it as clear, that such precautions at a place of the character of this, are not sufficient, and the omission of the flagman to be at his post, and in the discharge of his duty, is great negligence. Had the flagman been there, and fairly discharged his duty, can any one doubt that deceased would be still living? We presume not. Had he been warned, he would not have crossed until the train had passed. Again, the ringing of a bell or sounding of a whistle, as duty required, would have greatly enhanced his chances of escape. It would have attracted his attention, and he would, no doubt, have escaped. He knew, or is supposed to have known, that the law required the company to ring the bell or sound the whistle, and knowing that to be its duty, he had a right to rely upon its performance. On hearing no such signal, his attention was not attracted to his peril, but its omission was highly calculated to lull him into a fatal belief of security. At the time, the place, and under the circumstances, we regard it as gross negligence to have omitted the duty. If, then, this duty was omitted, the company was properly held liable for negligence, unless deceased was guilty of such negligence as would preclude a recovery.

If the jury found that the train was running at a greater rate of speed than allowed by the ordinance, and that was true,

as some of the witnesses testified, it was well calculated to throw deceased off his guard. He, no doubt, as he lived in the city, knew that the speed of the train was limited by law, and he had every reason to suppose that the engine-driver would observe it. If he looked and saw the train approaching, he had a right to believe that it would run only at the rate of not more than six miles an hour, and he, no doubt, calculated what distance he could progress before the train would reach the point of his crossing. And, if so, his calculation was, no doubt, correct that he could pass over before the train arrived, coming at that speed. But if it was running at double that, or even less, but a greater speed than the ordinance allowed, deceased would be wholly disappointed and liable to the collision.

The fact that the train struck him as it did, raises an irresistible presumption, that if the train was running faster than six miles an hour, that was the immediate cause of his death. If it was running 18 or 20 miles an hour, as a witness testified, or very fast, as a number of other witnesses testified, there can be no doubt that the unauthorized rate of speed was the cause of his death. If the speed was greater than the ordinance allowed, then the employees, considering all the circumstances, were guilty of recklessness that is wholly unjustified.

But was deceased guilty of such negligence as to bar a recovery? The evidence tends to show that he may have been guilty of some negligence, but we are unable to say that it preponderates on the side that he was. It is urged that he should have looked up and down the track to see if a train was approaching, and failing to do so, he was guilty of negligence. If the proposition was conceded, in its greatest breadth, the evidence fails to show that he did not do so, or that he came to his death by failing to take that precaution. Suppose he did look, and the train was running at too great a rate of speed, and no bell was ringing or whistle sounding,

and no signal was given by the watchman, can any one say that there was a want of care if he looked and saw the train?

We have seen that he had a right to rely upon the company's observing its duty in respect to each of these requirements. And he had an undoubted right to regulate his conduct accordingly. If the train was at such a distance from the crossing, that, at the prescribed speed, it could not reach the place he crossed before he could pass over the track, no one can say he was guilty of negligence.

Suppose he did look up and down the track, and he did see the head-light, and heard no bell or whistle, had he any reason to suppose the train was in motion, and as it was dark and he could not see it in motion, can any one say that he was guilty of negligence in attempting to cross? Surely not. Or seeing the train with the light headed towards him, and not seeing the train in motion, not hearing any signal from the bell or whistle, not having received any warning from the watchman, who was stationed there to know if there was danger and to give warning, and relying upon the trains not running at a speed of more than six miles an hour, can he be held guilty of negligence, as though the road had complied with these requirements? Most assuredly not.

Even if deceased was guilty of slight negligence, the evidence fully warranted the jury in finding his was slight and that of the company gross, at least, in not giving the warning to deceased.

After a careful examination of the entire evidence, we are unable to say that it is not sufficient to sustain the finding. Nor can we say it is contrary to appellant's instructions.

We perceive no error in the refusal of the court below to grant a new trial, and the judgment must be affirmed.

Judgment affirmed.

Mr. JUSTICE SCHOLFIELD took no part in the decision of this case.

CASES

IN THE

SUPREME COURT OF ILLINOIS.

NORTHERN GRAND DIVISION.

SEPTEMBER TERM, 1875.

BURADELLA G. SIMPSON

v.

WILLIAM H. HAM.

1. DOWER — *damages for detention — remedy.* On a petition for the assignment of dower, the court has complete jurisdiction, when it has assigned, to cause the widow's damages to be assessed for the detention of her dower; and when she elects to proceed by petition under the statute, and has her dower assigned, she can not then abandon that proceeding and invoke the aid of a court of chancery to take an account of the *mesne* profits. Her remedy in the proceeding by petition is full and complete, and she should pursue it then, and if she fails to do so, she will be deemed to have waived it.

2. APPEAL. If the court rule erroneously, in refusing to assess the widow's damages in a proceeding by petition for the assignment of dower, under the statute, the remedy is by appeal, and not by a bill in chancery

APPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. BANGS, SHAW & EDWARDS, for the appellant.

Mr. G. S. ELDRIDGE, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This bill was for an account of the rents and profits that accrued during the pendency of a cause commenced by complainant, under the statute, to have her dower assigned to her in certain lands, the fee of which was in William H. Ham.

It is alleged, that on the 1st day of March, 1871, complainant was entitled to dower in the lands described, and on that day she filed her petition for assignment of dower. The litigation was protracted until October, 1873, before dower was assigned, and it was April, 1874, before she obtained possession of that part assigned to her. At the date of filing the petition for dower, it is charged, the lands were improved and cultivated, and yielded, during the protracted period of litigation, large rents and profits to the owner of the fee, then in possession, over and above all taxes, repairs, and other proper disbursements, all of which were received by defendant, and that he refused to account to her for her just proportion, as damages, for the detention of her dower. The petition, it is alleged, claimed no damages for the detention of the dower, no demand having been previously made and no damages having then accrued.

It is further alleged, that, at the October term, 1874, of the circuit court, in the proceedings there had, complainant made a motion, notice having been given, to reinstate the cause, for the purpose of having the damages sustained by her in consequence of the detention of her dower after demand, assessed and allowed in that proceeding; but, on objections being made by defendant, the court overruled the motion, on the ground it had then lost all jurisdiction over the cause.

A general demurrer to the bill was, by the court, sustained, for want of equity, and the bill dismissed. That decision is the only error assigned.

It is not denied the statute furnished complainant an adequate remedy, in the same cause, where her dower was as-

signed, had she prosecuted her claim for damages in apt time. The provisions of the statute under which the proceedings were conducted, are, that, upon the approval of the report assigning dower, the court shall forthwith put the dowress in possession of the lands assigned to her; and "such widow shall also be entitled to her reasonable damages, to be awarded her from the time of her demand, and refusal to assign her her reasonable dower, which may be assessed by the court, or a jury, if required, shall be impanelled for that purpose, and execution issue therefor." R. S. 1845, p. 202, sec. 26.

No reason is shown why she did not move the court to have her reasonable damages assessed, when the court approved the report of the commissioners assigning dower. There being no further prosecution of the cause, it seems to have passed from the docket, perhaps without any order of court to that effect, or any action on the part of the petitioner, and nothing more was done until the October term, 1874, when the motion to reinstate the cause was overruled. Complainant's damages were not assessed in that cause simply because she did not ask to have it done at the proper time. The argument is, that complainant may abandon that proceeding under the statute when the last step was taken, and invoke the aid of a court of chancery to have an account of her damages taken against the owner of the fee.

At common law, no doubt, the widow might establish her right to dower at law, and then go into a court of chancery and compel the heir or his representative to account for *mesne* profits, and when the right to dower was not in dispute, chancery would assume concurrent jurisdiction with the courts of law, and direct the dower to be assigned.

On petition, under our statute, when the court has assigned dower, it has complete jurisdiction to cause the widow's damages for the detention of the dower to be assessed. It may be that, in the first place, she might have resorted, as at common law, to a court of equity, had her dower admeasured and an account taken of the *mesne* profits; but, having elected to

proceed by petition, under the statute, she will not be permitted to abandon that proceeding and invoke the aid of a court of chancery to take an account of the *mesne* profits.

This is, virtually, an original bill to compel what could have been and ought to have been done in the former suit, if she claimed damages. Should this be allowed, it would permit a party to try his case partly in a court having jurisdiction to render complete justice, to abandon that court and seek another court, with no greater powers in the premises, to obtain what further redress he might deem himself entitled to. Her remedy in the court having first acquired jurisdiction, under the statute, was full and complete, and she ought to have pursued it there. Not having had her damages assessed in that proceeding, she must be deemed to have waived them.

Complaint is made, the circuit court, at a subsequent term, overruled the motion made, upon notice, to reinstate the cause, that complainant might proceed to have her damages assessed. If the court ruled erroneously on that motion, the remedy was by appeal, and not by bill in chancery.

The demurrer was properly sustained, and the decree dismissing the bill will be affirmed.

Decree affirmed.

EMIL HORNER

v.

JESSE B. SPELMAN *et al.*

1. JUDGMENT IN ANOTHER STATE—*how authenticated.* Where a transcript of a judgment in a court of another State is certified by the clerk of the court, and the presiding judge certifies that the attestation is in due form, it is a substantial compliance with the act of Congress of May 26, 1790.

2. BANKRUPTCY—*should be pleaded.* It is not error to exclude a certificate of bankruptcy offered in evidence by the defendant, where the same has not been pleaded.

3. SAME—*debts contracted by fraud of the bankrupt, not discharged.* A discharge in bankruptcy is no defense to a suit on a judgment, which was for the "covins, frauds, wrongs and injuries" committed by the bankrupt defendant.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. WOODBRIDGE & BLANKE, for the appellant.

Mr. W. M. HOWLAND, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was debt, in the Superior Court of Cook county, on a judgment rendered by the Superior Court of Hartford county, in the State of Connecticut, in an action for damages sustained "by reason of sundry covins, frauds, wrongs and injuries by the defendant committed against the plaintiffs."

The defendant pleaded *nul tiel record*, payment, and accord and satisfaction of the judgment, on all which issues were made up and submitted to the court for trial without a jury.

The court found for the plaintiffs the amount of the judgment as debt, and assessed the damages by computing interest thereon, and rendered judgment accordingly. The defendant appeals.

Appellant makes objection that the record of the Superior Court of Hartford county is not well authenticated.

We are of opinion it is in substantial compliance with the act of Congress, May 26, 1790 (Rev. Stat. 1845, appendix, 624), and was properly admitted in evidence.

The clerk has certified a transcript of the proceedings, under the seal of the court, and the presiding judge of the court has certified that the attestation is in due form. This is all the act of Congress requires. *Ducommun et al.* v. *Hysinger*, 14 Ill. 249.

Under the plea of payment, it was attempted to be shown that, through an arrangement made with Tobias Kohn, who

was on defendant's bail bond in the suit in Connecticut, this judgment had been paid, but the evidence fails to show it. On the contrary, it is shown these plaintiffs have never received any part of it. They have Kohn's note for a part of it, not due at the time of this trial. This arrangement with Kohn was made, as we infer from the testimony, while an action was pending against him on the bail bond. Nothing has been realized from it, and the plea of payment is not sustained; nor could a release of Kohn from his bail bond be a payment of this judgment. This will not be denied. It is not like the payment of a debt by a surety, when he can claim, in equity, at least, to be subrogated to all the remedies of his principal. Nothing of the kind.

All that is necessary to be said on the refusal of the court to admit in evidence appellant's discharge in bankruptcy, is, that such discharge was not pleaded, and had it been, it could not avail, as the judgment obtained in the Superior Court of Hartford county was for "the covins, frauds, wrongs and injuries" committed by appellant.

Section 33 of the Bankrupt act provides that no debt created by the fraud of the bankrupt shall be discharged under that act. Bump's Law and Practice in Bankruptcy, 518.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

A. GREEN COURSON

v.

GEO. BROWNING *et al.*

1. PRACTICE—*time to object to cost bond.* An objection to a bond for costs, to be availing, should be taken at the earliest opportunity. The defendant can not raise such an objection for the first time after plea filed, or proceeding to trial, or default entered, or on error.

2. PLEADING—*declaration on appeal bond.* In a suit upon an appeal bond, which is in due form, and which recites a judgment in an inferior court and an appeal to the Supreme Court, and the declaration avers that the judgment was affirmed in the Supreme Court, it is sufficient, wtihout any averment, that the bond was filed and approved, in pursuance of an order of the court, as the presumption is that it was so filed and approved.

3. SUPERIOR COURT—*no more than one judge should sit at a time.* It is error for the judges of the Superior Court of Cook county, or circuit judges assisting them, to sit as a body or in bank; but each step taken in a cause should be by a single judge, and it should so appear from the record.

4. The various steps in a cause may be before different judges. One may settle a portion or all of the pleadings, another hear and determine a motion or motions, and another try the case, decide the motion for a new trial, and settle and sign the bill of exceptions; but the record should show what is done by each judge in the case, and that he acted alone in what was done.

5. Where the record shows that four judges were present trying a cause, one of them presiding over a full bench, it is such error as will compel a reversal of the judgment.

WRIT OF ERROR to the Superior Court of Cook county.

Mr. A. GARRISON, for the plaintiff in error.

Messrs. HUTCHINSON & LUFF, for the defendants in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It is urged that the names of all of the plaintiffs and defendants do not appear in the caption of the bond for costs, filed in the court below. There is nothing to show that the plaintiffs were non-residents, or the reason why the bond was filed; but even if there was, and even conceding the bond was subject to the objection, to be availing it should be taken at the first and earliest opportunity. The defendant can not be permitted to plead, or proceed to trial, or to suffer a default, and then raise such an objection for the first time. In this case appellant was served more than ten days before the default was entered. He thereby not only waived this objection, but all defense, and admitted the indebtedness. Nor

was any objection made to this bond in the court below; and even if the bond was not sufficient, the objection comes too late, when raised for the first time in this court. There is no force in this objection.

It is next urged, that the appeal bond sued on is void, as it was not approved by the presiding judge, or that there was an order of court in which the appeal was taken, authorizing the clerk to approve the same; that the declaration should have averred that such an order was made, and the bond approved in pursuance of the same; that for the want of such an averment, the declaration was so defective that it will not sustain the judgment by default.

We think there is no force in this objection. The bond is in due form, and the presumption is that it was approved in pursuance of a proper order. The bond recites the recovery against Young of the judgment appealed from, and the declaration avers that the judgment was affirmed in the Supreme Court, giving the time and the recovery of a judgment for costs by the appellees in the case, and averring that Young had not paid these judgments mentioned in the appeal bond, and the interest thereon, or the costs so recovered, or any part thereof. These averments were admitted by the default to be true.

Taking these averments to be true, Young used this appeal bond to procure a trial in the Supreme Court, and his security, appellant in this case, enabled him to do so, by joining in its execution; and, having obtained all the benefits of the bond, they should be estopped from denying that it is not a binding obligation, unless it contravenes some statute or some rule of public policy, neither of which was done by the execution of this bond. It was not prohibited by law, but even if it was not a good statutory bond, it would be good at common law. See *Coons* v. *The People*, 76 Ill. 383. No reason is perceived for holding this bond illegal or void, but it must be held amply sufficient to bind the makers.

It is next urged, that there appears, by the *placita*, to have been four judges sitting on the trial of this case in rendering the default and assessing the damages.

In the order of the court entering the default, it is recited "the Hon. Joseph E. Gary, presiding." The same order recites, that the court heard evidence, assessed the damages, rendered final judgment, and awarded execution. The only question is, whether the order should not have recited and shown that the judge presided alone, and as the sole judge in the case. In the case of *Hall* v. *Hamilton*, Sept. T. 1874, it was held to be error in the trial of causes by the judges of the Superior Court, or circuit judges assisting them, to sit as a body or in bank, but that each step taken in a cause should be by a single judge, and that it should so appear from the record; that the various steps in a cause might be before a different judge; that one might settle a portion or all of the pleadings, another hear and determine a motion or motions in the case, and another try the cause, decide the motion for a new trial, and settle and sign the bill of exceptions, etc.; but the record should show what was done by each judge in the case, and that he acted alone in what was done.

In that case it was held not to be sufficient to state that one of the judges presided, as it did not appear but that he presided over the other three, and that all four were engaged in hearing and conducting the trial. Now, here, it appears, from the *placita*, that Joseph E. Gary, Chief Justice, and the other two Superior Court judges, and the circuit judge from the seventh judicial circuit, were all present, and the judgment order shows that Judge Gary presided. We have endeavored to find the means to avoid a reversal on this ground, but we can see no escape from the conclusion that all four judges were present trying the case, and that one of them was then presiding over the full bench, with a circuit judge superadded. This is the clear and unmistakable meaning of the record. Had the clerk run his pen through the names of the two judges who did not preside, and omitted the

name of the circuit judge from his blank *placita*, then the record would have shown what the law requires to be done by a judge trying a case, and what would have been proper had Judge Gary presided alone in trying the case. But whatever the facts, this record states that four judges were present at the trial, and that one of them presided.

If the record in this case had stated, as it did in *Jones* v. *Albee*, 70 Ill. 34, that Judge Gary was alone presiding, then the objection would have been obviated, or that he alone tried the case, which would have been all that was required.

The judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

WILLIAM WRAY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

CONTINUANCE—*what is sufficient cause for.* A defendant was indicted for a crime, and employed and paid an attorney, and was tried, and the jury failed to agree, and he was remanded to jail, and there remained for several weeks, when he was again brought into court, and then, for the first time, notified that his attorney had abandoned his case, and it was set for trial on the next day, and he then had subpœnas issued for witnesses, and on the next day, when the case was called for trial, he made a motion for a continuance, supported by an affidavit showing these facts, and showing, also, that he had relied upon his attorney to prepare his case for a second trial, and that he did not know that the attorney had abandoned the case until notified of it, in open court, the day before; that, as soon as notified of it, he had subpœnas issued for witnesses, giving their names and residences, and stating what facts he expected to prove by them, which facts were material and necessary to a proper defense, and that, owing to the shortness of the time intervening between his ascertaining that his attorney had abandoned the case and the time of its being called for trial, the witnesses had not been found: *Held*, that sufficient diligence was shown, and the continuance should have been granted.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Messrs. E. W. & W. W. EVANS, for the plaintiff in error.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

The plaintiff in error, having been indicted at the May term, 1875, of the Criminal Court of Cook county, was brought to trial on the 25th of June succeeding, and the jury failed to agree, so that he was remanded to jail, where he has since remained. The charge was burglary, and, previous to this trial, he had employed and paid counsel, who conducted his case on that trial. The criminating circumstance against him, solely relied upon by the prosecution, was the fact of a coat stolen from the house which had been burglariously entered, having been found in his possession, together with a satchel containing burglar's implements, the next morning after the burglary.

On the 15th of July following the former trial, by order of court, the prisoner was brought into court, and there informed by the State's Attorney that prisoner's counsel had abandoned his case. The State's Attorney then had the cause set for trial, in prisoner's presence, for the next day, that being the 16th.

The accused had relied upon his counsel to prepare his case for a second trial, and to make his defense for him, and had, before the time mentioned, received no notice that his counsel had abandoned his case. Learning the fact, he, however, managed to have a subpœna issued for his witnesses, and, on the evening of the 15th, obtained other counsel, but, owing to the shortness of the time, the witnesses, although residing in the city, but being laborers, could not be found in time for the trial set for the 16th. Ascertaining this fact, he caused an affidavit to be prepared, setting forth substan-

tially the circumstances above detailed upon the question of diligence, the names, residence and occupation of the several witnesses, their absence without his fault, the facts he expected to prove by each, and, upon such affidavit, made a motion for a continuance. The motion was overruled, and the matter preserved by bill of exceptions. The trial proceeded. The accused was convicted, and sentenced to five years in the penitentiary. He brings the record to this court on error, and assigns for error the overruling of the motion for continuance.

The statute provides that error may be assigned in criminal cases for overruling a motion on behalf of the accused for a continuance.

The affidavit shows that plaintiff in error was, by the defection of his counsel, of which he was wholly ignorant until informed, on the day before the case was set for trial, by the State's Attorney, placed in a position well calculated to operate as a surprise upon him. The circumstances detailed in the affidavit seem ample to excuse him from exercising any greater degree of diligence than he did in preparing for a trial thus suddenly forced upon him. It fully complies with the requirements of the law in giving the names and residence of his respective witnesses, and what he expected to prove by each, and in showing that the proposed evidence was material and necessary. By one witness he expected to prove that, during all the night on which the burglary was committed, the witness and accused slept together in the same bed. By others, that the coat and satchel above mentioned were handed to the accused in the street, the next morning after the burglary, by a person who was a stranger to accused, for the pretended purpose of desiring the latter to hold them for a few moments, and, while so holding them, accused was arrested. This evidence was material, and, by the showing of the affidavit, was necessary to the defense.

We are of opinion the court below erred in overruling the motion for a continuance, under the circumstances in question, and for that error the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

JAMES MIX *et al.*

v.

SARAH BALDUC.

1. CONSIDERATION — *sale of land.* Where the owner of land gave a written memorandum to a party, stating that he would sell him a lot of land for a certain price, to be paid within a time named, but there was no agreement expressed in the writing, by the purchaser, to pay the price, and the purchaser afterwards built a corn crib and barn, and sunk a well, on the premises, and kept up the fences and paid the taxes, this constituted a sufficient consideration to make the agreement binding on the vendor.

2. SPECIFIC PERFORMANCE—*not enforced when purchaser makes default as to time of payment.* Where the purchaser of land delays offering payment of the purchase money for five months after the stipulated time for payment, without any excuse therefor, his right to call for a specific performance will be thereby precluded, unless the stipulated time for payment has been waived.

3. TIME OF PAYMENT — *waiver.* Where the vendor of land, after the expiration of the stipulated time for payment of the purchase money, distinctly recognizes the right of the vendee to the property, and asks to have refunded to him the taxes on the same for one year that he had paid on it subsequent to the expiration of the stipulated time for payment, the vendee having paid all the other taxes, a waiver of the time stipulated for the payment of the purchase money may be inferred.

APPEAL from the Circuit Court of Kankakee county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Mr. STEPHEN R. MOORE, for the appellants.

Mr. J. BROUSSEAU, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The bill of complaint in this case was filed by appellee to compel a conveyance to her of the north half of lot 4, in block 44, in the town of Momence, under the following instrument in writing to her:

"I will sell Sarah Delora the north half of lot No. (4) four, in block No. (44) forty-four, in town of Momence, for fifty dollars, dating the transaction from this day, and will execute her papers whenever she is prepared to pay, within three years, as she is a widow.

JAMES MIX.

MOMENCE, ILL., *April* 15, 1863."

The court below decreed the relief asked, upon payment of $75.45, the sum named in the writing, with interest.

The defendant appealed from the decree.

The bill alleges that, in May, 1861, Mix, for a good consideration, agreed to sell the half lot to the then husband of complainant, Alexander Deslauries, who, with his family, took possession thereof, fenced it and built a house upon it in that month, and occupied it with his family until his death, on the 4th of July, 1862, and that complainant has occupied and resided in the same ever since; that, on the 15th day of April, 1863, Mix agreed to sell her the lot for $50, and give her four years to make the payment, but that he fraudulently inserted in the memorandum in writing he gave her, three years as the time; that she was illiterate, could not read writing, and could not speak English; that the business was done through an interpreter.

The bill does not pretend that there was any offer made to Mix of the purchase price until September 20th, 1866, but claims that that was within the agreed time of four years. The proof fails to support this allegation of the bill as to four years' time. The complainant herself testifies in support of it, but she is contradicted by Mix, and the writing speaks against her. Her brother testifies that she was to have four years to

make payment; but, on further questioning, his means of knowledge was what the interpreter told him. The writing must be taken as the evidence of what the time was.

The non-performance on the part of complainant in the delay to make any offer of payment of the purchase price for so long after the stipulated time, without any excuse therefor, would preclude the right to call for a specific performance, unless the stipulated time for payment had been waived.

The evidence shows that the first attempt at payment was through one Taylor, a brother of complainant. He paid the money to one Ballard, for Mix. Ballard afterward offered to pay the money to Mix, and asked him for a deed, saying that was his instruction. Mix inquired who let him have the money. Ballard told him. Mix then said he did not propose for Taylor to speculate on the lot at his expense. Ballard told him that Taylor left the money for his sister. Mix said that the time he had promised to make a deed in had passed and gone by. He wasn't going to wrong the woman, but he didn't propose to have Taylor make money out of it. There was another piece of testimony as to a conversation between Mr. Balduc, the present husband of the complainant, and Mix, relative to paying taxes on the lot for 1867 or 1868. Mix said that he had paid the taxes on Mrs. Balduc's lot. Mr. Balduc asked him how much he had paid. He said he believed he paid $5. Mr. Balduc then said it was not $5, and then offered to pay back $3.75, the amount of the taxes. Then Mix said that he would see, and tell him the next time he came. Here, after the expiration of the time for payment, was a distinct recognition by Mix of the lot being Mrs. Balduc's lot, and asking to have refunded to him a tax he had paid on the lot for the year 1867 or 1868, being a year subsequent to the three years' time named in the writing. Except for this one year, the complainant, according to the testimony, had paid all the taxes from the time of making the writing to the filing of the bill. We think there is evidence from which the court below might have inferred that there was a

waiver of the time stipulated in the writing for making the payment.

It is objected to the validity of this instrument in writing, that there was no agreement on the part of the complainant to pay; that there was no mutuality of obligation. The testimony of the complainant was, that, since the making of the writing, she had built, on the premises, a corn crib, barn, and sunk a well, and kept up the fences and paid the taxes. We consider that here would be enough of consideration to make the agreement of binding force as to Mix.

We think the decree may be supported under the evidence, and it will be affirmed.

Decree affirmed.

THE PEOPLE *ex rel.* C. D. F. Smith

v.

THE COMMON COUNCIL OF THE CITY OF AURORA *et al.*

1. CITY COURTS—*construction of act of July* 1, 1874, *in relation to.* The act of July 1, 1874, effected changes in the city courts where the local acts otherwise provided, first, by changing the name of the courts; second, by making their jurisdiction concurrent with the circuit court in all civil cases, in appeals from justices of the peace, and in all criminal cases, except treason and murder, within the city; third, by making the proceedings and practice the same as in circuit courts, and, fourth, by requiring the judges to be elected in the same manner that city officers are elected.

2. It does not require that the judges of city courts must be elected by a single city, where, before its passage, they were elected by two or more cities.

3. COURT OF COMMON PLEAS OF ELGIN AND AURORA. The Courts of Common Pleas of Elgin and Aurora, established prior to the adoption of the constitution of 1870, are by that instrument continued in existence until otherwise provided by law, and, by the act of July 1, 1874, in relation to courts of record in cities, they were continued under the name of city courts, to be held by a single judge, to be elected by the votes of both cities.

This was an application in this court by C. D. F. Smith, the relator, for a *mandamus* to compel the common council of the city of Aurora and the city council of the city of Elgin to order an election, to be held for the election of a judge of the Court of Common Pleas of the cities of Aurora and Elgin, or of the city court of Aurora and the city court of Elgin.

Mr. C. D. F. SMITH, *pro se.*

Mr. M. O. SOUTHWORTH, for the common council of the city of Aurora.

Mr. EUGENE CLIFFORD, for the city council of the city of Elgin.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Courts of Common Pleas having been established in the cities of Elgin and Aurora by previous acts of the General Assembly, it was provided by an act of the General Assembly, amendatory thereof, in force February 16, 1859, that one judge should be elected by the qualified electors of the two cities, for both courts. The first election was to be on the fourth Monday of February, 1859, and thereafter the election was to be held on the fourth Monday of February of every succeeding fourth year. The person so elected was to hold his office until his successor should be elected and qualified. It is provided by section two of this act "that, if for any cause an election should not be held at the time herein specified, * * * then an election shall be held in the same manner provided for in case of vacancy, as specified in this act." This is found in section six, as follows: "In case of vacancy * * * * in the office of judge, immediately upon the fact becoming known, it shall be the duty of the clerks of said courts to fix upon a time, within four weeks thereafter, for a new election of judge, and to give notice thereof, in their respective cities, at least ten days before said elections, in a

public newspaper, in such city, for the same time, which shall be conducted in the same manner as provided by section two of this act."

No election for such judge was held, or ordered to be held, on the fourth Monday of February, 1875, and the relator asks a peremptory *mandamus* "commanding the city council of the city of Elgin and the common council of the city of Aurora, and the clerks of said courts, to cause an election to be held, according to law, by the voters of said cities, for a judge of the city court of Elgin and the city court of Aurora."

There can be no question that the Courts of Common Pleas for the cities of Elgin and Aurora were continued in force, subsequent to the adoption of the present constitution, as they existed under the act of February 16, 1859, until the "Act in relation to courts of record in cities," in force July 1, 1874, became a law, for this is expressly provided for by the fifth section of the schedule to the constitution. The only question is, to what extent does the last named act repeal or modify the provisions of the act of February 15, 1859.

It is enacted by the first section of the act of July 1, 1874, that "the several courts of record now existing in and for cities, and such as may hereafter be established by law in and for any city in this State, shall severally be styled 'the city court of (name the city),' and shall have concurrent jurisdiction with the circuit courts, within the city in which the same may be, in all civil cases, and in all criminal cases, except treason and murder, and in appeals from justices of the peace in said city, and the course of proceeding and practice in such courts shall be the same as in the circuit courts, so far as may be."

Section five provides that the judges of such courts, respectively, shall be elected by the qualified electors of such city, in the same manner that city officers of such city are elected, etc.

Section twenty is as follows: "The several courts of record *now* established *are hereby continued*, under the name and style of 'the city court of (name of city)' with all the powers and jurisdiction conferred by this act."

The changes effected where the local acts otherwise provided, are plainly these, and none other—

First—The name of the court is changed.

Second—It has jurisdiction concurrent with the circuit court, within the city, in all civil cases, in all criminal cases, except treason and murder, and in appeals from justices of the peace.

Third—The course of proceeding and practice is the same as in circuit courts.

Fourth—The judges are to be elected in the same manner that city officers are elected.

That the word "city" is uniformly used in the singular number, we regard of no significance to show that it was intended the judge should be elected from a single city, where, before, he was required to be elected from two or more cities, for this is used merely as a designation of the election district, which, in the cases of the courts thereafter to be organized, was a single city. A rule of construction, laid down in the same revision of the laws for the construction of this and other laws embraced in the revision, is, "Words importing the singular number may extend and be applied to several persons or things, and words importing the plural number may include the singular." R. L., p. 1011, sec. 1, third clause.

The section of the schedule, before referred to, continued the courts then in existence "until otherwise provided by law," and the language of the twentieth section continues the courts then established, but under a different name.

We are of opinion this continued the Courts of Common Pleas of Elgin and Aurora, under the name of city courts, to be held by a single judge, as they were then established, and who should continue to be elected by the votes of both

cities. This is not repugnant to any provision in the act, and there is nothing from which it clearly appears that this feature in the organization of the court was to be changed.

The peremptory *mandamus* is awarded.

Mandamus awarded.

GEORGE W. PLUMMER

v.

CHARLES W. RIGDON.

1. VERDICT. This court will not interfere with the verdict of a jury when the evidence is conflicting, even though it seems to preponderate against the verdict, unless it is apparent the jury have been actuated by passion or prejudice, and rendered a verdict manifestly wrong.

2. MEASURE OF DAMAGES—*for failure to convey land.* In an action by a purchaser of land to recover damages for a failure to convey, the value of the land at the time the conveyance is to be made, is the true measure of damages.

3. SAME—*on an agreement to exchange lands.* So in case of an agreement to exchange lands, and one of the parties knew at the time that he had no title to the land which he agreed to convey, in an action against him by the other party to recover damages for a failure to convey, the extent of the recovery should be measured by the value of the land to be conveyed to the plaintiff, and for the reason that the defendant sold land which, at the time he made the contract, he knew he did not own.

4. INSTRUCTION—*must be based on evidence.* It is not error to refuse an instruction when there is no evidence in the case upon which it can be predicated.

5. CONTRACT—*can not be rescinded for misstatement.* A mere misstatement by the vendor of property, as to its cost or value, in the absence of any fiduciary relation between the parties, will not authorize a rescission of the contract.

APPEAL from the Superior Court of Cook county; the Hon. JOHN BURNS, Judge, presiding.

Messrs. BRANDT & HOFFMAN, for the appellant.

Messrs. BAKER & OSGOOD, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by Charles W. Rigdon, to recover damages from George W. Plummer, for the breach of a written contract executed by the parties for the exchange of certain real estate in Chicago.

A trial of the cause before a jury resulted in a verdict in favor of Rigdon, for $3000. The court denied a motion for a new trial, and rendered judgment upon the verdict, to reverse which, this appeal was brought.

It is first urged that, even if the measure of damages had been the difference in value between the lands agreed to be exchanged, the verdict is against the evidence.

In regard to the real value of the lands agreed to be exchanged at the time conveyances were to be made, the evidence was conflicting, and while the evidence might seem to preponderate in favor of appellant, yet, under the uniform decisions of this court, unless it is apparent the jury have been actuated by passion or prejudice, and rendered a verdict manifestly wrong, we can not interfere.

The difference between the actual value of the lands agreed to be exchanged, which formed the basis for the verdict, was purely a question of fact for the jury, and, as is usual in proving the value of property, there was a clear conflict in the proof, which it was the duty of the jury to reconcile. This they seem to have honestly done, and it is by no means certain, if the same facts were submitted to another jury, under the same instructions, the result would be otherwise. Under such circumstances, if the law applicable to the facts has been properly given, the verdict must be regarded as final.

The next question properly arising upon the record involves a consideration of the instructions in regard to the measure of damages.

The court, at the instance of appellee, instructed the jury, in substance, that the measure of damages was the difference

between the value of the lands agreed to be exchanged, and refused the instructions of appellant which, in substance, confined the recovery to actual expenses and damages suffered, excluding any difference in the value of the property agreed to be exchanged.

It is clear, from the evidence, that appellant's failure to convey the property embraced in the contract did not arise from any impure motive or fraudulent purpose. The difficulty was, that he only had title to an undivided half of the property agreed to be conveyed, while the other undivided half was in one McClintock, who refused to join in the conveyance, and carry out the written contract of sale which appellant had entered into.

Appellant, no doubt, at the time he made the contract, thought and honestly believed that McClintock, who was, at the time, his father-in-law. would join with him in the conveyance of the property. This, however, McClintock refused to do. This left appellant powerless to perform the contract.

The question, then, presented is this: Where a vendor contracts to sell real estate for a stipulated price, at a certain time, and, upon the arrival of the appointed time, is unable to convey, in an action brought by the vendee to recover for a breach of the contract, what is the true measure of damages?

This point arose at an early day in this State, and, independent of what view we might now be inclined to take, were it a new question, it must be regarded as settled by the former decisions of this court.

In *Buckmaster* v. *Grundy*, 1 Scam. 310, which was an action of covenant, brought by the vendee against the vendor, to recover damages for a failure of the vendor to convey lands as required by a contract under seal, the court said: "It is also urged that the exact sum actually paid must not only be averred but proved, and that the sum so paid, and interest, constitute the measure of damages to be assessed by the jury. Though this may be the rule in an action upon a warranty,

to recover back the consideration, in case of eviction, it is not the rule in an action of covenant for a breach in failing to convey according to the terms of the contract. In such case, the value of the land at the time it is to be conveyed (as established by evidence,) is the true measure of damages."

The same question again arose in *McKee* v. *Brandon*, 2 Scam. 339, and the court, in deciding the point, said: "The rule was correctly laid down, that the measure of damages for the non-conveyance of the land, was the value of the land at the time it was to be conveyed."

In *Gale* v. *Dean*, 20 Ill. 320, which was an action brought by Dean against Gale, to recover for a breach of a contract which provided that Gale should procure a conveyance of a tract of land from a third party, it was said: "The measure of damages in this case was not the value of the land when the contract was made, but its value at the time of the breach of that contract."

Under these authorities, it may be regarded as the settled law in this State, that, in an action by a vendee to recover damages for a failure to convey, the value of the land at the time the conveyance is to be made, is the true measure of damages.

It is true, a different rule prevails in England, and it was held, in the leading case of *Flurean* v. *Thornhill*, 2 W. Blackstone, 1078, that, upon a contract for a purchase, if the title proves bad, and the vendor is (without fraud) incapable of making a good one, the purchaser was not entitled to damages for the fancied goodness of the bargain which he supposed he had lost.

But even in that country the decisions of the courts do not seem to be harmonious upon the question, and, notwithstanding the clear enunciation of the rule in *Flurean* v. *Thornhill*, *supra*, in a later case, of *Hopkins* v. *Grazebook*, 6 Barn. & Cress. 31, it was said: "Upon the present occasion, I will only say that, if it is advanced as a general proposition, that, where a vendor can not make a good title, the purchaser shall

recover nothing more than nominal damages, I am by no means prepared to assent to it." The defendant was accordingly held responsible for the damages sustained by a breach of the contract.

In *Robinson* v. *Harmon*, 1 Excheq. 849, the same rule was applied. See, also, *Pounsett* v. *Fuller*, 17 Com. B. 660. These decisions last cited proceed upon the ground that, where a vendor sells that which he knew he did not, at the time, own, and was not certain of acquiring, he should, in such cases, be held liable for all damages sustained by the purchaser by the loss of the bargain, but upon what principle these cases can be distinguished from *Flurean* v. *Thornhill, supra*, in an action at law upon a contract, it is not quite apparent.

Under the doctrine announced, however, in *Hopkins* v. *Grazebook, supra*, appellee was entitled to recover damages for the loss of his bargain, which damages should be measured by the value of the lands to be conveyed to him by the contract of purchase, for the reason that appellant sold land which, at the time he made the contract, he knew he did not own.

Appellant insists that the rule which governs in an action to recover damages for the breach of a covenant of seizin, where the recovery is confined to the purchase money and interest, should control in an action for a breach of an executory contract to convey lands.

This is the rule adopted in several of the States. The rule, however, is different in this State, and we are satisfied the doctrine announced by our court is sustained by the weight of authority. *Hill* v. *Hobert*, 16 Me. 164; *Hopkins* v. *Lee*, 6 Wheaton, 109; *Drake* v. *Baker*, 34 N. J. 358; *Lawrence* v. *Chase*, 54 Me. 194; *Boardman* v. *Keeler*, 21 Vt. 84; *Kirkpatrick* v. *Downing*, 58 Mo. 32; *Barnham* v. *Nichols*, 3 R. I. 187; *Wells* v. *Aberthany*, 5 Conn. 222.

Neither is it clear why the rule that controls in an action to recover for a breach of the covenant of seizin, should be

applied where an action is brought to recover for the breach of an executory contract.

In the former case, we presume the recovery is restricted to the amount paid for the land at the time the conveyance is made, because the covenant of seizin is broken, if the grantor had no title, at the time the deed was delivered. The right of action had then accrued. The fact that eviction subsequently followed for the want of title at the time the conveyance was made, could not affect the question, but a contract containing a covenant to convey land at a future day, is of a different nature.

The covenant requires the conveyance to be made at a future day, if the land rises or falls in value. It is the right of the purchaser to receive a conveyance of it in its increased or diminished condition, on the day agreed upon in the contract.

If, then, the vendor fails to execute a conveyance at the time required by the contract, we see no reason why the damages of the vendee should not be measured by that general rule that gives the vendee the value of the specific article purchased, on the day it is to be delivered. *Connell* v. *McLean*, 6 Harris & J. 297.

It is also urged that the court erred in refusing appellant's second instruction, which was as follows:

"2. If the jury believe, from the evidence, that the plaintiff falsely represented to the defendant that the house on West Washington cost over $7000, when the same cost only $4500, and that the defendant relied on such representations, and the plaintiff, by other false representations, as well as the foregoing, induced the defendant to enter into the contract sued on, and that the defendant would not have entered into said contract but for the said false representations of the plaintiff—then the jury are instructed, as matter of law, that the plaintiff can not recover in this case."

The record does not contain evidence upon which an instruction of this character can be predicated.

The contract executed by the parties required Rigdon to complete the house on Washington street according to certain plans and specifications. Appellant, when purchasing the property and making the contract, had no right to rely upon the statements of appellee as to the value or cost of the property. If he did so, it was at his own peril. By a reference to the plans and specifications, the value and expense of the building could have been determined.

A mere misstatement by a vendor of property, as to its cost or value, in the absence of any fiduciary relation between the parties, would not authorize a rescission of the contract for that reason. *Banta* v. *Palmer*, 47 Ill. 99.

It is also urged that appellee's first and eighth instructions assume, as a matter of fact, that there was a difference in value between the lands agreed to be conveyed.

Upon a careful examination of the instructions, we fail to find that they are liable to the criticism made upon them. They are not drawn in such a manner as to prejudice appellant's case or mislead the jury.

The last point relied upon by appellant is, that the court improperly excluded the offered evidence that the auction sale made by appellee of a portion of the property appellee agreed to convey appellant, was a sham.

If appellant had offered to prove any admissions of appellee to the effect that the auction sale was not made in good faith, such would have been proper, but we are aware of no rule which would permit proof of a general notoriety with which appellee was in nowise connected.

As no substantial error is perceived in the record, the judgment will be affirmed.

Judgment affirmed.

SAMUEL GOTTS

v.

BARRETT B. CLARK.

1. LIABILITY *of husband for goods sold to the wife.* Where goods necessary and suitable to the position in life of a wife are sold to her, on the credit of her husband, and charged to him, a jury will be justified in finding that the wife was the agent of the husband to make the purchase.

2. MINORS—*father of, not liable for goods sold.* An express promise, or circumstances from which a promise may be inferred, must be proven before the father can be made liable for goods sold and delivered to his minor child.

3. Goods which were necessary to the comfort of a minor daughter of the defendant, were sold to her whilst she was living away from home, and receiving her own wages, and charged to the father: *Held*, that the father was not liable.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. W. S. MYERS, and Mr. L. S. PARKER, for the appellant.

Messrs. BARBER & LOGAN, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This action was brought by plaintiff, to recover of defendant the value of goods sold and delivered to defendant's wife and minor daughter. So far as the goods sold to defendant's wife are concerned, we see no reason why he should not pay for them. The evidence shows he is a man of considerable wealth; that the goods purchased were necessary and suitable to his wife's position in life, and under the circumstances proven the jury were justified in their finding, that she was his agent to make the purchases.

It is with great reluctance, however, that we reverse the judgment as to the articles sold to defendant's minor daughter.

The goods bought by her were of little value—were such as she needed, and without which the evidence shows she had not enough to make herself comfortable.

But defendant has a technical defense to the action, so far as it is sought to recover for goods sold to his daughter, of which he is willing to avail. When she made the purchases, she was living away from his home, was working for wages, and was receiving the benefit of her own labor. No reason is shown why she did not live at her father's house, and had she done so, the presumption will be indulged, whether well founded or not, he would have supplied her with necessaries suitable to her station in life. At all events, the circumstances proven will not justify the inference she had authority to buy the goods on the credit of defendant. An express promise, or circumstances from which a promise may be inferred, must be proven before a father can be charged for goods sold and delivered to his minor child, by a third party. Neither has been proven in this case. *Hunt* v. *Thompson,* 3 Scam. 179.

Appellant has printed in full the transcript of the record. Of course he will be allowed no costs for it, but only for the abstracts, which are quite full enough to present all the points in the case.

The judgment will be reversed and the cause remanded.

Judgment reversed.

GEORGE WEBSTER *et al.*

v.

FLAVEL K. GRANGER *et al.*

1. SALE OF PERSONAL PROPERTY—*delivery of goods sold* is not necessary to pass title, as between the parties to the sale.

2. SALE OF GOODS BY SAMPLE—*delivery ticket.* Where goods in the hands of a carrier are sold by sample, and a delivery ticket, in the form of an

order, by the proper railroad or station agent, to deliver the goods therein described to the person therein named or bearer, is delivered to the purchaser, with a sample, the title to the goods is thereby completely vested in the purchaser, and if they are afterwards destroyed it is his loss, and he is liable for the price agreed on.

3. There can be no custom giving a purchaser, by sample, 24 hours, or any other time, to examine the goods. He purchases by sample, and if the goods do not prove equal to the sample, he may return them, or sue for and recover the difference.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. HOWE & RUSSELL, for the appellants.

Messrs. RUNYAN, AVERY & COMSTOCK, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, on the common counts, for goods (flax seed), sold and delivered by the plaintiffs to the defendants, brought to the Superior Court of Cook county, resulting, on a trial by the court without a jury, in a finding and judgment for the plaintiffs. The defendants appeal, and insist the finding is not sustained by the evidence—that, at most, it establishes a contract of sale, and not an actual sale of the flax seed.

Appellants contend, they had a reasonable time in which to examine and remove the goods, and until that time elapsed the title was not in them.

The flax seed was shipped by appellees to their commission merchants, Foss & Co., of Chicago, for sale. There were one hundred and thirty-four sacks "on the track" at the Galena depot, and Foss sold them, by sample, to appellants, at one dollar and fifty-five cents per bushel, delivering them a sample and a delivery ticket therefor. This was on Saturday, 7th October, 1871, about noon of that day. The goods were destroyed by the October fire.

It was held in *Michigan Central Railroad Co.* v. *Phillips et al.* 60 Ill. 190, that the delivery of a bill of lading, unin-

dorsed, did not transfer a merely equitable title, like the delivery of an unindorsed note. It gave as valid and effectual title to the goods as could be obtained by the actual delivery of the goods themselves.

The only difference between the bill of lading and a delivery ticket is, that in the former the goods may not have started on their destination, in the latter the purport of the ticket is, they have actually arrived, ready to be delivered to the holder of the ticket.

It is understood, this ticket is in the form of an order, upon the proper railroad or station agent, to deliver the goods described in the ticket to the person named in it, or to bearer, and is in common use for the delivery of grain.

By this order to deliver the goods to bearer, and appellants being the bearer, they were thereby vested with all the necessary indicia of ownership of the goods, and could have transferred the title to them to a purchaser from them. They had full power to sell the moment they became possessed of the ticket, even if the payment of the money was a condition precedent, the circumstances proved showing a waiver of this condition by the seller. Can it be doubted, if, on the receipt of this delivery ticket by appellants, they had soon after found a purchaser for these goods at an advance, that they would not have sold them? The purchaser from them would certainly have acquired the title to the goods.

We have no doubt the title vested in appellants by their purchase, and acceptance of the delivery ticket.

It is urged by appellants, that the custom governing sales of this character is, that the purchaser has twenty-four hours in which to examine the goods after taking possession. This can hardly be, when the sale is by sample. The purchaser buys by sample, and has no occasion to examine the goods. Should they prove, on examination, after he has them in possession, to be not equal to the sample, he may return them, or sue for and recover the difference. It would be impossible to do business in any great mart of trade in any other way.

Millions are involved in purchases by samples, and they, with tickets, pass as readily as current bank notes. It is absurd to say, such purchasers have twenty-four hours, or any other time, in which to inspect the goods.

Here was a full delivery of these goods by symbol, and appellants could have passed the title to their vendee in the same way. *Michigan Central Railroad Co.* v. *Phillips, supra.*

We repeat, after the delivery ticket was passed to appellants, there was nothing for appellees to do. They had parted with their control over the goods, and the same became vested in appellants, who were to weigh them and pay for them.

This purchase was made at noon of Saturday, and appellants had several business hours of that day in which to remove the goods. They were at their risk, and could have maintained replevin for them.

We can not appreciate the argument of appellants, that the delivery ticket was not a delivery of the goods for any other purpose than for examination. The examination of the sample was an examination of the goods, and there was an implied warranty that the bulk should equal the sample.

It is said by appellants, that delivery alone does not pass title. That may be in some cases, they depending on their circumstances. Nor is delivery necessary to pass title as between the parties, as this court has often held.

But in this case, every element of a sale and delivery exists, the sellers having nothing more to do with the goods, but to receive the account of weight from appellants, and the agreed price. The price was fixed, and the goods placed under the control of appellants, and they should pay for them as they agreed. See *Peters et al.* v. *Elliott et al., post,* p. 321.

The judgment is affirmed.

Judgment affirmed.

Mr. CHIEF JUSTICE SCOTT dissenting.

Syllabus.

ARCHIBALD ZUEL

v.

THOMAS BOWEN.

1. PLEA IN ABATEMENT—*denying partnership.* Where parties are sued on a note, as partners, and one of them wishes to put in issue the fact of partnership, the proper practice is to plead in abatement.

2. PLEADING AND EVIDENCE—*as to the fact of the execution of a note.* But where the parties sued were in fact partners, and the firm name was improperly signed to the note for the private purposes of one of the partners, then, in order to place the *onus* upon the plaintiff to prove the joint liability of the defendants or the proper execution of the note in the name of the firm, the other partner should file a plea denying the execution of the note, verified by affidavit.

3. SAME—*before justice of the peace.* In proceedings before a justice of the peace, appellate courts will only look at substance, and disregard forms.

4. In a suit before a justice of the peace, against two parties as partners, upon a note signed by the firm name of such partnership, no plea is necessary to put in issue either the execution of the note or the fact of partnership, but an affidavit presenting the issue is sufficient.

5. Where a suit was brought before a justice of the peace, against two parties as partners, upon a note signed by the firm name, and one of the parties filed a plea "that he neither signed, nor authorized, or consented to the execution of the note" verified by his affidavit: *Held*, that, on the trial of the case in the circuit court, it was error to permit the note to be read in evidence, without proof of its execution being first made.

6. PARTNERS—*authority of, to sign notes in firm name.* Each partner is the agent of the other to sign the partnership name to notes given within the scope of the partnership business, but not to sign the firm name to notes relating to business outside of the scope of the partnership.

APPEAL from the Circuit Court of Grundy county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. S. W. MUNN, for the appellant.

Mr. W. T. HOPKINS, and Messrs. RICKOLSON & SNOW, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a suit brought by Thomas Bowen, before a justice of the peace of Grundy county, on a promissory note for $200, against Archibald Zuel and G. A. Randall. The summons was served on Zuel, but Randall was not found. On the trial before the justice of the peace, Zuel filed this plea:

"And now comes the said Archibald Zuel, one of the said defendants in the above entitled cause, and says 'that he neither signed or authorized, nor consented to the execution of the said note declared on,' and of the truth of this, he puts himself upon the country, etc."

This plea was verified by his affidavit, in which he states that it is true in substance and in fact.

The note was signed by "Randall & Zuel." They were summoned by the names of "Archibald Zuel and Gresham Randall, firm of Randall & Zuel." On a trial before the justice, plaintiff recovered a judgment for the amount of the note, and Zuel appealed to the circuit court, where a trial *de novo* was had, with a similar result, and he brings the record to this court on an appeal, and asks a reversal.

The error assigned is, that the court, against the objections of appellant, permitted the note to be read in evidence, without any proof of its execution, notwithstanding the sworn plea. On the other hand, it is claimed that there was no error, as the plea is claimed to be too narrow to operate as a denial that it was rightfully executed by Randall as a partner and on behalf of the firm; that it may be conceded that Zuel did not execute the note, or that he did not consent to it, or authorize it to be done, and yet Randall may have had ample power to sign the note in the name of the firm. Appellant claims that the plea puts in issue that question as well as the other.

The policy of our statute seems to be to free proceedings before justices of the peace, as far as possible, from technicalities, and still enable the parties to have a fair trial. It is

not practicable, before persons who have not made the study of pleadings, evidence and practice, to have observed the same niceties in these branches of jurisprudence as obtain in the superior courts, nor is it desirable that it should. The great object is, that the parties litigant in that forum may have a cheap and speedy administration of justice, freed from unnecessary forms, and the burthens imposed upon litigation in the superior courts by the employment of counsel. This being the case, we only look to substance, and disregard form in the proceedings before that tribunal. Even a plea was not necessary, but an affidavit denying the execution of the note would have answered every purpose, and would have been considered a plea.

At the common law, a party offering any kind of instrument in evidence was required to prove its execution before it could be admitted. But, as a matter of convenience, and to lessen the expense of litigation, the General Assembly has dispensed with such proof, unless rendered necessary by a plea denying the execution or liability under oath. And when such denial is made, the party offering the instrument is then required to prove its execution, as at common law, before it can be read in evidence. And the 36th section of the Practice Act, R. S. 1874, authorizes a person sued as a partner to deny his liability as a member of the firm, by pleading in abatement, or by a plea in bar, denying the joint liability, or the execution of the instrument sued upon, verified by affidavit. If a partnership did not exist between defendants then the proper plea would have been in abatement. But if they were partners, and the firm name was improperly used for the private purposes of one of the partners, the proper practice would be for the other to file a plea denying the execution of the instrument, verified by affidavit. And, so far as we can see, that may have been the fact in this case. See *Davis* v. *Scarritt*, 17 Ill. 202, and *Stillson* v. *Hill*, 18 Ill. 262, and authorities there cited.

But it is urged that the fact that Randall and Zuel were partners, gave each authority to sign the firm name; that each thereby became the agent of the other for the transaction of the firm business, the giving of firm notes included. This is true of all business within the scope of the partnership. But it is not true of other business not embraced in the scope of the partnership.

If, in this case, the note was given for Randall's private debt, or for purposes not embraced in the business of the firm, Randall had no authority, unless specially licensed for the purpose, to sign the firm name. If, then, this note was given for other than firm purposes, Zuel's name was signed without authority, and it was not binding on him; and he expressly states that he neither signed, nor authorized, nor consented to the execution of the note. This language is broad and comprehensive, and, we think, clearly denies that Randall had authority to sign the firm name to the note, and conforms to the statute.

We are, therefore, under the previous decisions of this court, and a fair construction of the statute, of opinion that this plea required the plaintiff below to have proved the execution of the note before it could be received in evidence, and, in permitting it to be read without such proof, there was error, and the judgment must be reversed and the cause remanded.

Judgment reversed.

MARK SHERIDAN *et al.*

v.

H. D. COLVIN *et al.*

1. CITY COUNCIL OF CHICAGO—*powers of, under the act of April* 10, 1872. The city of Chicago having been reincorporated under the act of April 10, 1872, to provide for the incorporation of cities and villages, the city

council possess the power to provide for the appointment of a city marshal, and to vest him with the entire control of the police force, and to reorganize the police department by ordinance, and to carry out and give effect to the provisions of such ordinance when passed.

2. And when such an ordinance is passed, it takes the functions given to the board of police, by the act of their creation, away from them, and confers them upon the officers named in the ordinance.

3. SAME—*board of police.* Where the city council, under the act of 1872, have reorganized the police department of the city, and provided for the control and management thereof, the authority of the board of police over the police force of the city, being inconsistent with the plenary power conferred upon the city council over the subject matter by the act of 1872, ceases.

4. The city council have no power to pass an ordinance abolishing the board of police, or the office of commissioner of such board, but they may deprive them of all their functions as city officers; and such an ordinance can only be sustained as applying to the board of commissioners in their capacity of city officers.

5. CHANCERY—*courts of, have no jurisdiction of subjects purely political.* The subject matter of the jurisdiction of courts of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. It has no jurisdiction in matters merely criminal or immoral, which do not affect any right of property, nor do matters of a political character come within its jurisdiction.

6. A court of chancery has no jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of the rights of property.

7. Equity will not interfere, by injunction, to restrain persons from exercising the functions of public offices, on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law.

8. In this case, it was sought to enjoin the city council of a city from enforcing an ordinance, on the sole ground that, if the ordinance was enforced, it would deprive the complainants of the functions of offices which they held in the city: *Held*, that a court of chancery had no jurisdiction.

APPEAL from the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

April 23, 1875, an election was held in the city of Chicago, under the provisions of the general act to provide for the incorporation of cities and villages, approved April 10, 1872,

with a view to incorporation under that act. Upon a canvass of the votes by the common council, a majority was declared to be found in favor of such new incorporation, but proceedings, in the nature of a *quo warranto*, were soon thereafter instituted to determine the validity of the same, which are still pending. Assuming to act under such new incorporation and the provisions of said act, the city council, June 28, 1875, passed an ordinance, approved by the mayor, for the reorganization of the police department of the city. The ordinance contains seventeen sections, and those deemed material to the questions involved are as follows:

"*Be it ordained by the city council of the city of Chicago:*

"SECTION 1. There is hereby established and created an executive department of the municipal government of said city, to be known as the police department.

"§ 2. There is hereby created the office of city marshal of said city. The term of said office shall be two years, commencing with July 1, 1875, and the salary attached to said office shall be $4000 per annum. The said city marshal shall be appointed by the mayor, with the approval of the city council. He shall be the head of the police department, and shall give a bond, with security to be approved by the mayor, in the sum of $25,000, conditioned for the faithful performance of the duties of his office, and that he shall well and truly account for and pay over all moneys, and surrender any and all property, books and papers which may come into his hands as such city marshal, on the expiration or sooner termination of his term of office. He shall, as such head of the police department (subject to all general ordinances of the city), assume and exercise the control of the police force of the city, and shall possess full power and authority, subject to all general ordinances of the city council, over the police organization, government, appointments and discipline within the said city, and shall have the custody and control, subject to the direction of the city comptroller, of the public property,

books, records and equipments belonging to the police department.

"§ 3. The said city marshal, as such head of the police department, shall be charged with the duty of preserving the peace of the city, preventing crimes and arresting offenders, of protecting the rights of person and property, preserving order and providing a proper police force at every fire, protecting strangers and travelers at steamboat landings and railway stations, and causing to be enforced all ordinances of the city.

"§ 4. The duties of the police force shall be executed under the direction and control of said city marshal, and according to the rules and regulations which he may promulgate, from time to time, for the more proper government and discipline of the subordinate officers and the police force of the city, and reasonable forfeiture of pay may be imposed by such rules and regulations for any neglect of duty or misconduct.

* * * * * * * * *

"§ 6. It shall be the duty of the city marshal, from time to time, to divide the city into police districts, and to assign captains and sergeants of police to each of such districts, and he may establish a station, or sub-station, in any precinct, for the accommodation of the police force on duty therein. All regulations and orders made by said city marshal shall be promulgated through the superintendent of police.

"§ 7. The city marshal may appoint persons of suitable character, who may be in the employment of the city, in other branches of the city government, as special policemen; but such persons so appointed shall receive no pay for their services as such special policemen. Such policemen shall possess the same powers as the regular police patrolmen, and shall be subject to all the rules and regulations governing the police force.

"§ 8. The city marshal shall have power, on the application of any person or persons showing the necessity thereof,

to appoint and swear any number of additional police patrolmen to do duty at any fixed place within the city, at the charge and expense of the person or persons by whom the application is made. Such persons so appointed shall conform to, and be subject to, all rules and regulations governing the police force of the city, and to such special rules and regulations as the city marshal may make concerning such police patrolmen. They shall possess all the powers, privileges and duties of the regular police patrolmen, and may be removed or discharged from service, at any time, by the city marshal, with the written concurrence of the mayor.

"§ 9. The city marshal may, also, upon an emergency, or riot, pestilence, invasion, or with the written consent of the mayor, during any public election or celebration, appoint as many special patrolmen, from among the citizens of Chicago, as he may deem necessary, and for a specified time, and during the term of service such special patrolmen shall possess all the powers and privileges and perform all the duties of patrolmen of the standing police force of the city.

* * * * * * * * *

"§ 17. The police force, as heretofore existing, shall continue to be the police force until otherwise changed under this ordinance; but the board heretofore known as the board of police, and the office heretofore known as that of commissioner of the board of police of the city of Chicago, shall cease to exist, and no duties shall hereafter be performed or powers or authority exercised in connection with said police force by said board, or any commissioners of the Board of Police of said city, after the passage of this ordinance."

Appellants being police commissioners of said city at the time of such alleged new incorporation thereof, as aforesaid, filed their bill in chancery in the circuit court of Cook county, June 30, 1875, against the mayor, the individual members of the common council, the comptroller and treasurer, to restrain all acts under said ordinance, upon the sole grounds that

complainants, as such commissioners, possessed the only authority to control the police force, its organization, government, appointments and discipline, in said city, with the right to the custody and control of all public property, books, records, etc., belonging to said department, and that the common council had no power or authority to divest them, by means of such ordinance, of such control, functions or custody, and confer the same upon a city marshal. A temporary injunction was issued, pursuant to the prayer of the bill, which the court afterwards, upon general demurrer, dissolved, sustained the demurrer for want of equity, and, complainants electing to stand by their bill, it was dismissed by the court, and they appealed to this court.

Messrs. FULLER & SMITH, for the appellants.

Messrs. GOUDY & CHANDLER, for the appellees.

Mr. JUSTICE MCALLISTER delivered the opinion of the Court:

Elaborate printed arguments have been filed by the counsel for the respective parties in this case, and able and exhaustive oral arguments delivered at bar, all of which, having been considered, we are prepared to give our conclusions.

It is not claimed by counsel for appellants, that the validity of the new organization of the city, under the general act of 1872, can be, in any respect, drawn in question in this suit. Such a question can be determined only by a direct proceeding, in the nature of a *quo warranto*. Assuming, then, that the city of Chicago became incorporated under that act, by virtue of the election held April 23, 1875, the provisions of the act of 1872 thereby became its charter, to which we must look for the extent of its corporate authority, with such limitations as may be found to arise from the provisions of section 6 of the act.

With these preliminary observations, we will proceed to state, as briefly as possible, our views and conclusions.

The case resolves itself into three principal questions, viz: (1.) Had the city council the power, under the provisions of the act of 1872, to pass the ordinance in question? (2.) What is the nature of the power thereby sought to be exercised? (3.) Had the court of chancery jurisdiction to interfere with its exercise?

These questions will be considered in the order stated.

First, then, as to the power. That question can properly be determined only by a consideration of the legal *status* of the police commissioners at the time of the new incorporation of the city, and reference to the several provisions of the act of 1872, pertinent to the subject. We have, however, no concern with the legal *status* of the police commissioners. any farther than relates to their functions as city officers. Now, the act creating the board of police, declares that "the said board shall assume and exercise the *entire* control of the police force of said city, and *shall possess full power and authority over the police organization, government, appointments and discipline within said city.*" By the same law that board also had the custody of all property belonging to the police department.

Such was the authority vested in the board of police, composed of appellants, at the time of the new incorporation of the city, under the act of 1872, and it amounted to an exclusive control over the police force of the city. But it has not been, and can not be, denied, that these functions and their continuance with these municipal officers, were entirely subject to legislative control. The legislature could, in its discretion, provide for the creation of another officer, and for taking these functions from the board of police and bestowing them upon that officer. Appellants' counsel concede this, but insist that the legislature has not done so. Let us see whether this be so or not. Upon this point we would say, that, in our opinion, from a consideration of the whole scope and purpose of the act, as well as the provisions of section 3, the new incorporation did not, *ipso facto*, repeal the act creating and defining the powers and duties of the police com-

missioners, or abolish their office *in toto*. That section says: "If a majority of the votes cast at such election shall be 'For city organization under general law,' such city shall thenceforth be deemed to be organized under this act; and the city officers then in office shall, thereupon, exercise the powers conferred upon like officers in this act, until their successors shall be elected and qualified."

This clause, taken in connection with one in section 6, evinces the legislative intent, in respect to the manner in which re-incorporation should be effected. The latter is as follows: "And from the time of such organization or change of organization, the provisions of this act shall be *applicable* to said cities and villages, and all laws in conflict therewith shall *no longer be applicable*. But all laws or parts of laws not inconsistent with the provisions of this act shall continue in force, and applicable to any such city or village, the same as if such change of organization had not been made."

There is a plain difference between a legislative declaration, that an inconsistent prior law shall not be *applicable* to certain municipal corporations, and one, that it is repealed. The legal effect of that provision is, that, if the law creating the board of police, or any prior statute relating to a corporation reorganized under the act of 1872, shall be found in conflict or inconsistent with any of the provisions of that act, such inconsistent law shall no longer have any applicability within the territorial limits of such new organization. If such inconsistent law originally applied beyond such territorial limits, it may continue to do so, but not within them. The act of 1872, like much of our legislation, is wanting in that complete mechanism requisite to the exact fitting of one part with every other part, so as to make one harmonious whole. But the intention of the legislature to provide a general system of local municipal government required by the policy of the constitution prohibiting the passage or alteration of city charters by special law, and to enable existing corporations to effect changes in their organic law with as little disturbance

as possible, is very apparent from the whole act. The powers confided to the local legislative department of such new corporations are broad and plenary, especially as respects the police department, the only matter now before us; and one object of the clauses from the 6th section above quoted, clearly was, to remove all obstacles arising from prior laws, to the exercise of such powers.

The first subdivision of section 62, article 5, of the act of 1872, gives the city council the control of all the finances *and property* of the corporation. This, of course, would include the property belonging to the police department, the entire custody of which, by prior laws, was given to the board of police.

Subdivision 66 of the same section gives the power *to regulate the police of the city, and pass and enforce all necessary police ordinances.* Sixty-eight, to prescribe the duties *and powers* of a superintendent of police, policemen and watchmen.

By section 73 it is provided that "the city council may, in its discretion, from time to time, provide by ordinance for the election by the legal voters, or appointment by the mayor, with the approval of the city council, of a city collector, *a city marshal*, a superintendent of streets, a corporation counsel, a city comptroller, or any or either of them, and such other officers as may by said council be deemed necessary or expedient." This section further provides: "The city marshal shall perform such duties as shall be prescribed by the city council, for the preservation of the public peace and the observance and enforcement of the ordinances and laws."

Section 74 provides that "all officers of any city, except where herein otherwise provided, shall be appointed by the mayor, (and vacancies in all offices except the mayor and aldermen shall be filled by like appointment,) by and with the advice and consent of the city council. The city council may, by ordinance not inconsistent with the provisions of this act, prescribe the duties and define the powers of all such officers, together with the term of any such officer, provided the term shall not exceed two years."

It seems to us clear, beyond doubt, that, by these several provisions, ample authority is conferred upon the city council to not only provide for the appointment of a city marshal, and vest him with the entire control of the police force, but to reorganize that department, as purports to be done by the ordinance in question. If the council had the power to pass the ordinance, it must have the power to carry it into effect; and if it had the power to pass and enforce it, then the effect must be to take the functions given the board of police, by the act of their creation, away from that board, and confer them upon the officers named in the ordinance. The continued possession, therefore, by the board of police of an exclusive authority over the police force, is utterly inconsistent with the exercise of the plenary power over the subject matter conferred upon the city council by the act of 1872, and by force of the 6th section of that act, the prior law can no longer be applicable.

The last section of the ordinance, it is conceded by appellees' counsel, is too broad. But that can not affect the other provisions of the ordinance, because they are in no respect dependent upon it. It may be regarded as applying to appellants only as city officers, in which view it might be sustained. For, authority in the city council to take away their functions as city officers, which we think the council has, is virtually to deprive them of their offices, so far as they were such city officers.

The second question is, what is the nature of the power sought to be exercised, in passing the ordinance under consideration? To that question there can be but one answer, and we shall not stop to discuss it. The power is legislative and discretionary.

The third and last question is: Had the court of chancery jurisdiction to interfere with the exercise of that power? We are clearly of opinion that it had not. The subject is purely political. The only title to relief shown by the bill is that arising from the mere fact of complainants being

police commissioners, vested, as it is alleged, with the entire control of the police force, etc. The bill does not go upon the theory of any property right, but is an application to a court of equity to restrain the city council and other officers of the city from carrying said ordinance into effect, on the ground that it will deprive them of the functions of their office. It is elementary law, that the subject matter of the jurisdiction of the court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely immoral, which do not affect any right to property. Nor do matters of a political character come within the jurisdiction of the court of chancery. Nor has the court of chancery jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of rights of property. Kerr on Injunctions, pp. 1 and 2.

In the case of *Sherlock* v. *The Village of Winnetka*, 59 Ill. 398, this court said: "There are some acts which a municipal corporation, while acting within the limits of its charter, may do, without being subject to the supervision of any court. Such acts are those done under its legislative and discretionary powers." Willard's Eq. Jur. 405.

Again, in High on Injunctions, the author says: "A court of equity is not a proper tribunal for determining disputed questions concerning the appointment of public officers, or their right to hold office, such questions being purely of a legal nature, and cognizable only by courts of law. Thus, equity will not interfere, by injunction, to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum, and a temporary injunction granted *pendente lite*, and, until the question of the validity of the law under

which defendants claim their office can be determined, will be dissolved." *Delahanty* v. *Warner et al.* 75 Ill. 185.

We are of opinion that the demurrer to appellants' bill was properly sustained, and that the decree of the court below should be affirmed.

Decree affirmed.

WILLIAM EMPSON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. GRAND JURORS—*mode of obtaining.* The act of April 10, 1872, providing for the clerk of the court to draw from the jury box kept in the county clerk's office, for the purpose of obtaining grand jurors, was repealed by the act of May 7th, 1873, which provides that the county board of the county shall select the grand jury.

2. SAME—*filling panel.* Under the statute of 1873, where the grand jurors regularly summoned have been discharged, the court may order a special venire for a grand jury, and this is the only mode to obtain one under such circumstances, unless it was summoned from the bystanders.

WRIT OF ERROR to the Circuit Court of Henry county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

Messrs. WILSON & LADD, for the plaintiff in error.

Mr. JAMES K. EDSALL, Attorney General, for the People.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

The only point urged as ground for reversal of the judgment in this case is, that the court below erred in ordering a special venire for the grand jury which found the indictment.

It appears by the record, that, on the first day of the February term, 1874, of the circuit court of the county of Henry, twenty of the persons who had been summoned as grand

jurors appeared and answered to their names, and it appearing to the court that the jurors had not been legally drawn, the court discharged said persons, and ordered that the sheriff summon from the body of the county twenty-three persons duly qualified to serve as grand jurors, and thereupon a venire was issued for such grand jury.

The grand jury summoned under the venire found the bill of indictment.

The 9th section of the act concerning jurors, approved May 7th, 1873, Laws 1873, p. 113, provides: "If, for any reason, the panel of grand jurors shall not be full at the opening of any court of record, the court shall direct the sheriff to summon from the bystanders, or from the body of the county, a sufficient number of persons having the qualifications of jurors, as provided by this act, to fill the panel." Section 19½ of the act provides: "That the judge of any court of record of competent jurisdiction may order a special venire to be issued for a grand jury at any time when he shall be of opinion that public justice requires it." Here would seem to be sufficient warrant of law for the action of the court in ordering the special venire for a grand jury.

The claim on the part of plaintiff in error is, that the court should have ordered its clerk to draw from the jury box kept in the office of the county clerk, twenty-three names, and that the persons so drawn should have been summoned as grand jurors. This was a mode of obtaining a grand jury under the statute of April 10th, 1872. But the act of May 7, 1873, repealed the statute of April 10th, 1872, and provides an entirely different mode for the procuring of a grand jury, viz: that the county board of the county, at least twenty days before the sitting of the court, shall select twenty-three persons to serve as grand jurors for the ensuing term, who shall be summoned as a grand jury for such term.

The persons regularly summoned as grand jurors having been discharged, there was no other mode open to the court, under the statute of 1873, to obtain a needed grand jury,

than the one adopted, unless to direct one to be summoned from the bystanders.

Plaintiff's counsel make the assertion that, at the times of summoning the first and second grand juries, the law of April 10th, 1872, was the only statute then in force regulating the manner of drawing or selecting grand jurors, and entirely ignore the existence of the act of May 7, 1873. Why so, no reason is suggested, and none is apparent why this act of 1873 should not have force as law, as it appears on the statute book.

The judgment will be affirmed.

Judgment affirmed.

WILLIAM H. OVINGTON

v.

GEORGE W. SMITH *et al.*

1. INJUNCTION BOND—*undertaking of surety strictly construed.* The undertaking of a surety on an injunction bond must be strictly construed, and he can not be held liable beyond the precise terms of his undertaking.

2. An injunction bond was given to two parties, who were enjoined, and the condition was, that the obligors should pay to said two parties all damages that might be awarded against the complainant on the dissolution of the injunction, and the injunction was dissolved as to one of the defendants, and damages assessed in his favor against the complainant. In a suit brought on the injunction bond against the surety, to recover the amount of the damages so assessed, it was *held*, he was not liable, his undertaking being to pay to the two parties damages upon the dissolution of the injunction as to both of them, and not to one upon the dissolution of the injunction as to him alone.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. S. F. NORTON, for the appellant.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

George W. Smith and Daniel D. Schrœder, who sue for the use of Daniel D. Schrœder, brought this suit against William H. Whitty and William H. Ovington, on an injunction bond, executed by the latter to the former.

The condition of the bond, after reciting that Whitty has filed his bill in the Superior Court of Cook county, against George W. Smith and Daniel D. Schrœder, praying, among other things, to restrain them from selling, transferring, or removing the goods, etc., from a certain store, upon which the court had ordered the writ of injunction to issue, etc., is as follows:

"If the above bounden William H. Whitty and William H. Ovington, their executors, administrators, or any of them, shall and do, well and truly, pay or cause to be paid to the said George W. Smith and Daniel D. Schrœder, their heirs, executors, administrators or assigns, all such costs and damages as shall be awarded against the said complainant Whitty, in case the said injunction shall be dissolved, then the above obligation to be void," etc.

It is alleged in the declaration, and was proved on the trial, that the injunction was dissolved, as to Schrœder, on the 14th of April, 1873; that upon his filing suggestions of damages, the court awarded him as damages, against Whitty, the sum of $500.

No other proof of damages was given, and the question is, was the judgment against appellant, for the damages thus awarded, proper?

We are of opinion it was not. Appellant's undertaking, as has been seen, was to pay Smith and Schrœder such damages as should be awarded against Whitty, upon dissolving the injunction. The injunction was not dissolved (as against Smith it continued in force), and there was no undertaking to pay Schrœder such damages as he should sustain upon dis-

solution of the injunction as to him alone. Appellant's undertaking, as surety, is to be strictly construed, and he can not be held liable beyond the precise terms of his undertaking. *Waters* v. *Simpson*, 2 Gilm. 570; *Sharp* v. *Bedell*, 5 id. 88; *Miller* v. *Stewart*, 9 Wheaton, 680.

The judgment is reversed.

Judgment reversed.

ABRAHAM LIPMAN

v.

ELIAS LOWITZ.

1. COMPOSITION AGREEMENT—*construction of.* A composition agreement should not receive a construction more comprehensive than the reasonable import of its language would signify, and should be limited in its effect to such matters as were within the contemplation and intention of the parties at the time of its execution.

2. An agreement by which a creditor agrees to take 25 per cent on each and every dollar that his debtor owes and is indebted to him, in full discharge and satisfaction of the several debts and sums of money that the debtor owes and stands indebted to him, does not affect any debts which may afterwards accrue to the creditor.

3. Where a creditor held several notes of his debtor, and indorsed one of them to a third party, and afterwards, and whilst said indorsed note belonged to the indorsee, made a composition agreement with his debtor, whereby he released and discharged him from all debts and sums of money then due and owing from such debtor to him, stating the aggregate amount of such indebtedness: *Held*, that this agreement would not affect the right of the creditor to collect from the debtor whatever sum he might afterwards have to pay, as indorser of the note so indorsed before the execution of the composition agreement.

4. PAYMENT—*as to the mode.* And in such case it would not affect the right of recovery of such indorser as against the maker, that the former paid the note to the indorsee by giving his own note therefor instead of paying the money.

APPEAL from the Circuit Court of Cook county; the **Hon.** LAMBERT TREE, Judge, presiding.

Mr. JOHN LYLE KING, for the appellant.

Mr. RUFUS KING, and Mr. A. C. STORY, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The principal ground relied upon by appellant to secure a reversal of the judgment is, that the circuit court erred in giving appellee's seventh instruction, which was as follows:

"The jury are instructed, that, if they believe, from the evidence, that the agreement of compromise read in evidence was entered into by the plaintiff, and that, at the time of such agreement being made and signed by him, there was no false or fraudulent representations made by the defendant concerning the amount of his liabilities or assets; and even if the defendant carried out the agreement, can not prevent the plaintiff, Lowitz, recovering all the money he was obliged to pay as indorser of the defendant's notes, after the said agreement was made, if any such money he did pay. So, if, at the time of the making of the said agreement, the notes of the the defendant, Lipman, or any or either of them, were held by third parties, and the plaintiff was obliged to and did pay them, by reason of his having indorsed them, and this payment was made by him after said agreement was made, then, in that case, the plaintiff is entitled to recover all that he so paid on the said notes."

In the summer of 1871, the appellant, being indebted to appellee in the sum of $6000, gave him his four promissory notes, two for $1500 each, one for $1000, and one for $2000. The $1500 note, that matured on the 11th day of October, 1871, was indorsed and transferred, before it became due, to the German National Bank, by appellee.

In the month of December, following, and while the German National Bank held as indorsee the $1500 note, appellant made a settlement with his creditors, and a composition

agreement was executed, which agreement contains the following:

"That we, the said several and respective creditors, shall and will accept, receive and take of and from the said Abraham Lipman, for each and every dollar that the said Abraham Lipman does owe and is indebted to us, the sum of twenty-five cents, in full discharge and satisfaction of the several debts and sums of money that the said Abraham Lipman does owe and stand indebted unto us."

This agreement was signed by appellee, and at the foot of his signature he wrote down his claim against appellant, at the sum of $4500.

The German National Bank, that held the $1500 note, did not become a party to the agreement.

In the month of January, 1872, after the execution of the composition agreement, appellee paid the German National Bank the amount due upon the $1500 note held by the bank, upon which he was indorser. The payment was made partly in cash and in part by appellee's own paper.

The position of appellant is, that the legal effect of the composition agreement discharged him from any future liability to appellee on the $1500 note.

It will be observed that the language used in the agreement is, that the twenty-five cents on the dollar, which appellant agreed to pay, was to be accepted in discharge and satisfaction of the several debts and sums of money that appellant was then owing to the parties who executed the agreement.

It does not, in terms or by implication, embrace causes of action or liabilities that might arise or be incurred in the future. We are aware of no authority that would sanction a construction of a contract of this character more comprehensive than a reasonable import of the language used would signify. And a composition agreement, like the one under consideration, should be limited in its effect to such matters as were within the contemplation and intention of the parties, at the time of its execution. *Butcher* v. *Butcher*, 1 Bos. & Pull. 113.

When the contract was made, appellant was not indebted to appellee upon the note. It was held and owned by the bank, and whatever amount of money appellant owed upon it, was due and owing from him to the bank.

It is true, appellee had indorsed the note, and as indorser might have been compelled to pay the indorsee the amount of the note. But that was by no means certain. Appellee's liability depended upon the insolvency of the maker, and, perhaps, the diligence which had been or should be used by the bank to enforce payment of the maker. At all events, when the composition agreement was made, the liability of appellee as indorser was not fixed, certain and definite. This being the case at the time the agreement was executed, appellee had no claim upon appellant on account of the $1500 note.

If, in the future, appellee should be required to pay the bank the note, as indorser, then, and not until that event had occurred, would he have any subsisting claim or demand on account of the note against appellant.

The manner in which appellee signed the agreement, is enough, of itself, to establish the fact that it was not within the intent of the contracting parties to include this note in the agreement. If such had been the intention, appellee's claim would have been put down at $6000. This, however, did not occur, but appellee's debt was stated upon the agreement to be $4500, thus leaving out the identical amount of the note which had been indorsed to the bank.

When, therefore, appellee, after the composition agreement had been made, was compelled, as indorser, to pay the note in question, a cause of action arose in his favor, not, perhaps, upon the note itself, but to recover so much money as he was required to pay; and this recovery could be had under the common counts of the declaration.

Cuyler v. *Cuyler*, 2 Johns. 186, was a case where the plaintiff held a note against the defendant, which he indorsed to a third party, and, while the note was so held, the plaintiff executed a contract to the defendant, the legal effect of which

was to relieve the defendant from all demands then existing. Subsequently, the plaintiff was required to pay the indorsed note, and it was held, that the cause of action had arisen subsequently to the execution of the release, and was not affected by it, and that the action for money paid would lie. See, also, *Crawford* v. *Swearington*, 15 Ohio, 264.

Appellant has cited two authorities to sustain his position. The first is Parsons on Contracts, page 713, where the author says, a "release, strictly speaking, can operate only on a present right, because one can only give what he has, and can only promise and give what he may have in future. Where one is now possessed of a distinct right, which is to come into effect and operation hereafter, a release, in words of the present, may discharge the right."

This authority does not, in any manner, help appellant's position. Appellee had no distinct right, so far as the note held by the bank was concerned, at the time the release was given, and hence it could not operate upon it, as we have heretofore shown.

The case of *Pierce* v. *Parker*, 4 Metc. 80, also cited, upon examination, will be found not to sustain appellant's position.

The agreement upon which the decision in the case last cited was predicated, was much broader than the one in the case at bar. It embraced all "claims, demands, actions, and causes of action." And it further appears, from the opinion, which is an important element, that the parties, at the time the release was executed, had in view the claim which formed the subject matter of the litigation.

These two important elements clearly distinguish the case cited from the one under consideration.

We are, therefore, satisfied, the instruction given is fully sanctioned by the authorities; and appellant's second instruction, which in substance presents an opposite view, was properly refused.

It is also urged, that the judgment can not be sustained, for

the reason that the appellee had not paid, in money, the entire amount of the note held by the bank.

The proof upon this point is, that appellee had paid a portion of the note in cash, and gave his own paper for the balance, and lifted the note.

It is immaterial, so far as this action is concerned, in what manner the note was paid. A payment in merchandise, or by appellee's own paper, would be as effectual as a payment in cash.

As the record discloses no substantial error, the judgment will be affirmed.

Judgment affirmed.

GEORGE W. MYERS

v.

FIRST NATIONAL BANK OF FAIRBURY.

1. SURETIES—*release by extension of time to principal, without their assent.* Where an extension of time is given a principal debtor for the payment of money, by a valid and binding agreement, without the assent of the sureties, they are thereby released.

2. CONSIDERATION FOR AGREEMENT TO EXTEND TIME—*payment of usurious interest.* An agreement by the holder of a promissory note, made with the principal in said note, without the knowledge or consent of the sureties, to extend the time for the payment thereof, in consideration of usurious interest paid by the principal, and accepted by the holder of such note, is a valid and binding contract for an extension of time, and releases the sureties.

APPEAL from the Circuit Court of Livingston county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Mr. A. E. HARDING, and Mr. D. L. MURDOCK, for the appellant.

Mr. H. H. MCDOWELL, and Mr. L. E. PAYSON, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The law is well settled, that, where an extension of time is given a principal debtor for the payment of money, by a valid and binding agreement, without the assent of the sureties for its payment, they are thereby released. *Danforth* v. *Semple*, Sept. T. 1874. That principle is conclusive of the case at bar. Appellant was the security for the other makers of the note which is the basis of this action. An extension of time was given the principals to pay the indebtedness evidenced by the note, without the knowledge or consent of appellant. The consideration for the agreement was, that they would pay plaintiff interest at an usurious rate on their indebtedness. That consideration was paid by one of the principals, and was accepted by plaintiff. According to the doctrine of *Danforth* v. *Semple*, *supra*, the payment of such a consideration created a valid and binding contract for the extension of the time of payment of the note for the period agreed upon, and having been made without the knowledge or consent of the surety, he was thereby released.

Appellee has assigned a single cross error, viz: the court erred in sustaining appellant's motion to strike from the record the stipulation of the parties to submit the cause for trial.

The evidence furnished by the affidavit on file is conflicting as to whether the stipulation was understandingly placed with the files of the case, and for that reason we are not willing to say the court erred in its judgment. We adopt this view the more readily because it is apparent appellee has suffered no injury in consequence of the action of the court. It is not claimed appellee was not afforded ample opportunity to present all its evidence. The course pursued by the court was in the interest of justice. No injury came to appellee, and had appellant been compelled to try the cause on the stipulation alone, he would have been deprived of testimony that was all important to his defense.

The judgment will be reversed and the cause remanded.

Judgment reversed.

HARRIET C. THOMAS

v.

S. C. HINSDALE *et al.*

1. REMEDY—*for wrongfully suing out attachment.* A defendant in attachment who has been wrongfully complained against, may defend the attachment, may sue on the attachment bond, or bring trespass.

2. WAIVER OF TRESPASS—*by appearance.* Where a writ of attachment is wrongfully issued and served, the defendant does not, by appearing before the justice who issued it, and applying for and obtaining a change of venue, waive the trespass.

3. TRESPASS *against an officer for wrongfully issuing attachment.* If a justice of the peace issues an attachment when not authorized to do so, his ignorance as to the extent of his authority is no excuse.

4. A party went before a justice of the peace, on Sunday, and made an affidavit, upon which the justice issued an attachment, and appointed another party to execute it, who took the writ, and, under it, seized and carried away the goods of the defendant in the attachment. The defendant appeared before the justice, and procured a change of venue to another justice, but did not defend the attachment suit any further, but brought an action of trespass against the plaintiff in the attachment suit, the justice who issued it, and the appointed constable who served it: *Held*, that they were all liable, and that the right to bring the action of trespass was not waived by appearing and taking the change of venue in the attachment suit.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Mr. C. F. REMICK, for the appellant.

Mr. A. B. JENKS, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was trespass, in the Superior Court of Cook county, brought by Harriet C. Thomas, plaintiff, against S. C. Hinsdale, S. C. Myers, and M. B. McDonough, defendants, and tried by a jury. Under instructions from the court for defendants, and to which plaintiff excepted, the jury found the defendants not guilty, on which the court, having overruled

a motion for a new trial, rendered judgment against the plaintiff for costs, and she appeals.

The case is in a small compass.

Myers, it appears, came to Hinsdale's office, who was an acting justice of the peace, early in the morning of Sunday, and made affidavit for an attachment against the plaintiff. The magistrate issued the writ, and, at Myers' request, appointed McDonough a constable to execute it. McDonough, under the direction of Myers, took the writ and went to Lawndale, where Mrs. Thomas was doing business in the grocery line, with an express wagon, and levied the writ on her property, took the goods out of her possession, and they were afterwards sold, and the proceeds paid over to Myers.

On the return of the attachment before Hinsdale, Mrs. Thomas appeared and obtained a change of venue to justice Banyon. She failed to appear before Banyon and defend that suit, but brought this action of trespass.

The court ruled, inasmuch as she had appeared before Hinsdale and asked for and obtained a change of venue, she thereby condoned the trespass. This is the effect of the ruling of the court.

We have no doubt the court erred in so ruling. No case so holding can be found. A defendant in attachment, who has been wrongfully complained against, may defend the attachment, may sue on the attachment bond, or bring trespass. No question of irregularity of service comes up in the case, and such cited cases have no application. Nor does the doctrine apply, that a magistrate, in performing an act he is authorized to do, erring in its performance, shall not be subject to an action. Here, the magistrate, at the instigation of Myers, performed an act the law gave him no authority to perform. McDonough executed the writ, having no authority whatever to execute it, and Myers instigated all the proceedings, and was profited by them. No justification is shown, nor can any be. Ignorance of the extent of his power is no

excuse for the magistrate, nor of the law any excuse for the other defendants.

McDonough was an occupant of Myers' office, he himself claiming to be a lawyer, and the whole proceeding against this woman seems to have been wanton, as it was clearly unjustifiable.

The appearance of appellant before Hinsdale, the magistrate who issued the writ, for a change of venue, should not have been adjudged by the court a waiver of the trespass, and the court erred in so ruling.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed.

T. LYLE DICKEY *et al.*

v.

CHARLES H. REED *et al.*

1. INJUNCTIONS—*power to award them.* To the complete authority of a court to award an injunction, it is necessary that there shall be a complainant, who must file a bill, alleging facts, showing that he has an interest in the matter in litigation, or at least a right to complain and have relief for others. There must be a matter about which rights are claimed, and that matter must be within the power of the court, when properly before it, to act upon or control it, by its sentence; and if any or either of these essential requirements are wanting, the court can not decree that a restraining order shall issue.

2. A court of chancery has no power to restrain, by injunction, a board of canvassers from canvassing the returns of an election, where the law under which the election was held, neither in terms nor by implication confers such power, and where there are no facts before the court which require it to take judicial cognizance, and hear, adjudicate and decree.

3. Whilst the writ of injunction is one of the most important in the law, and is, in fact, indispensable to the complete administration of justice, it is liable to great abuse, and it would not be wise, nor would it promote justice, to extend its use to cases of doubtful right, or to accomplish ends where there are other adequate remedies.

4. SAME—*when writ void.* A writ of injunction, issued in a matter where the court could not, under any circumstances, have power to hear, determine and decree in reference to such matter, is *coram non judice*, and void.

5. SAME—*when issued by a court having no power, need not be obeyed.* Where a writ of injunction is issued by a court which has power over the subject matter, and authority to take jurisdiction, it must be obeyed; but where the power of the court is wholly wanting, the writ is void, and can legally operate on no one, nor can any one be punished for contempt for disobeying it.

6. POLITICAL POWER OF THE STATE—*not subject to the control of the courts.* It was not designed, when the fundamental law of the State was framed, that either department of government should interfere with or control the other, and it is for the political power of the State, within the limits of the constitution, to provide the manner in which elections shall be held, and how they shall be contested, and the courts can not interfere.

7. The political power of the State may organize municipal bodies, and put them into operation by force of enactment, or by election by the people to be thus governed, and may provide the mode of reviewing the returns of all elections, to ascertain whether they are in accordance with the expressed will of the people, and until the courts are empowered to act, by the constitution or by legislative enactment, they must refrain from interference.

8. CONTESTED ELECTIONS—*power of a court of chancery.* When the law provides a mode for contesting an election, that mode must be followed.

9. Courts of equity have no inherent power to try contested elections, and they have never exercised such power, except in cases where it has been conferred by express enactment or necessary implication therefrom.

10. Where an election was held in a city on the question of whether the municipality should become incorporated under the general incorporation act for cities and villages, and a writ of injunction was issued out of the circuit court, enjoining and restraining the board of canvassers from canvassing the returns and declaring the result, it was *held*, that the circuit court had no power to issue the writ, and therefore it was utterly void, and the canvassers were not bound to obey it, and could not be punished for contempt for refusing to obey it.

11. COUNTY SEAT CONTESTED ELECTIONS—*jurisdiction in, conferred by implication on courts of equity.* Where courts of equity in this State have taken jurisdiction of contested county seat election cases, it has been upon the express ground that the constitution had provided that county seats should not be removed, except upon a vote of a majority in favor of removal, and that the legislature, in providing for such elections, failed to provide any means of contesting them; and to protect the rights of the

majority intended to be secured to them, it was *held*, that the fundamental law, by implication, conferred the power on courts of chancery to hear and determine such cases.

12. But these cases are an exception to all other cases, and if they are recognized as a class of cases, they are a class in which nothing but county seat questions are embraced, and no other character of election cases is embraced therein, and the rule is not to be considered as extending the power to other or different cases.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Mr. T. LYLE DICKEY, Mr. M. F. TULEY, Mr. WM. C. GOUDY, Mr. EMERY A. STORRS, Mr. JAMES P. ROOT, and Mr. FRANCIS ADAMS, for the appellants.

Messrs. ROSENTHAL & PENCE, and Messrs. LAWRENCE, CAMPBELL & LAWRENCE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the 23d day of April, 1875, an election was held in the city of Chicago, to determine whether that municipality would change its charter, and the people would become incorporated under the general incorporation act for cities and villages, which went into force on the first day of July, 1872. On the 26th of that month, the prosecuting attorney and five others, tax-payers of the city, filed a bill in the circuit court of Cook county against forty aldermen, composing the common council of the city, and the city clerk. It alleges the omission, by the mayor and common council, to submit, in express terms or otherwise, to a vote of the people, the question of minority representation, and charges that, on account of such omission, the election held on the 23d of the month was void; also, that a large number of illegal and fraudulent votes were cast in favor of organization under the law; that a large number of ballots not actually cast by voters were deposited in the ballot boxes by the judges, or by their connivance; that in some of the wards there were no poll lists and no clerks, and

that if the illegal votes were rejected, the result would be against organization under the act; that the judges had returned, or were about to return, their canvass of the votes, including such illegal and fraudulent votes so cast and received, and those cast at the polling places where no poll lists were kept; and that complainants had good reason to believe, and did believe, that the common council would proceed to declare the act of 1872 adopted.

Affidavits were filed in support of the bill, and in compliance with the prayer thereof a temporary injunction was ordered, restraining that body from canvassing the returns made to them by the judges and clerks of the election. The injunction was to remain in force ten days, with leave to defendants to move to dissolve, and like leave to the complainants to move to continue the same.

The writ was issued and served on the 26th of April. The common council, on the same day, were in session, and after the writ was served they appointed a committee to procure legal advice and assistance to defend the suit. They employed Wm. C. Goudy, M. F. Tuley, E. A. Storrs, and J. P. Root, to assist the regular law officers in such litigation as might grow out of the election.

After being thus employed, the mayor of the city put to them, and to the corporation counsel and his assistant, the question whether the members of the common council would be liable to punishment for contempt of court if they should, notwithstanding the injunction, proceed to canvass the returns, and declare and certify the same. They, after deliberation, answered, that the circuit court had no jurisdiction in the case, and the writ was void, and that the defendants could not be legally punished for contempt, in case they should disobey the writ.

These opinions were in writing, signed by counsel and delivered to the mayor, and at a meeting of the common council, on the 3d of May, 1875, were read to that body whilst in

session, and they canvassed the returns, declared the result, and caused it to be entered on the records of the city.

On the 4th of May, the original bill was amended and a supplemental bill was filed, making the city a party, and setting out what had subsequently transpired after issuing the writ, and praying that the city be restrained from exercising the powers conferred by the act of 1872, thus declared to have been adopted. A motion to strike the supplemental bill from the files was overruled.

On the next day defendants answered the original and supplemental bills, and complainants moved to continue the injunction, but the motion was denied. The injunction expired by the lapse of time. On the 12th of that month complainants dismissed their supplemental bill.

On the 14th, complainants, on affidavits filed, moved for a rule on the members of the common council who canvassed the returns and the attorneys who signed the opinions, to show cause "why they should not be punished and committed" for a contempt of court—the members for violating and the attorneys for advising the violation of the injunction.

A rule was, accordingly, entered, requiring them to show cause by the 21st of May, at 10 o'clock, and requiring them to answer interrogatories. They were subsequently exhibited, and answers thereto were filed by all of the defendants. The members of the common council admitted the canvassing of the returns, and the attorneys admitted the giving of the opinions referred to herein. The court found the defendants guilty of a contempt, and fined each of a number of aldermen $100, and each attorney $300, and they all appeal to this court.

It is first urged, that there is error in the form in which the judgments are entered. This may be true, but we have chosen to consider and determine the case on its merits, passing over technical objections.

The General Assembly have not only failed to define the offense of resisting the authority of the State, as exercised by the courts, and declare the penalty or punishment to be

inflicted, but in the last revision of our statutes omitted the prior provision on the subject. They have thus repealed the law authorizing courts to punish contempts offered in the presence of the same, and for disobedience to their orders and process. Whether it was the design of that body to strip the courts of that power, or to leave them to exercise the undefined power as it existed at the common law, or whether, the courts being created by the constitution, and the power to punish for contempts being inherent in courts of record, the right is not constitutional and beyond the power of the General Assembly, are questions not discussed in this case, and, in the view we have taken of it, become unimportant in its decision.

It is urged by appellants, that the court below had no power to entertain jurisdiction of the case, or to issue the writ, and that all which followed the filing of the bill was utterly void; that the want of power to entertain a bill in such a case, or to make the restraining order, rendered the whole proceeding void and of no effect, and, being void, appellants had the right to disregard its requirements, and to proceed to the performance of a plain duty required of them by the statute, although in violation of the restraining order of the court. This we understand to be, in substance, the position assumed by appellants.

On the other hand, appellees insist, that if the court had power, as contradistinguished from mere jurisdiction, to entertain a bill to review the canvass of election returns in any case, and to correct frauds, accidents or mistakes, then the want of jurisdiction in the particular case did not affect the power to issue the writ; that the court had power, and had exercised it in contested county seat cases, independent of statutory authority, and as an inherent power, or, if not inherent, a power derived from the constitution, and hence the court had power in this case to issue the writ and punish those refusing to observe its requirements, or for disobedience

to its commands, as a contempt of the authority of the court and the State.

Thus, it is seen, that a question of much interest, and, it may be, of great importance, is presented for consideration. It is a question of how far a court of equity may use its powers to relieve against frauds, accidents or mistakes in elections, where its action must determine which of two persons shall fill an office, or, as in this case, which of two forms of local government shall control the people of this municipality. If the election may, in this case, be thus contested, and the municipal officers and others be restrained from performing the functions and duties imposed, until, by the tedious process of taking depositions and preparing the case for trial, the case can be heard in the court below, and an appeal, with the incident delays, may be heard, years would, in all probability, elapse, before the government chosen by the people could, in many instances, go into operation. Hence, it is the policy of the law to afford a more speedy and a less expensive mode of settling these contests.

If the court may exercise this jurisdiction in cases of doubt, or even where there is no doubt of the result, a few contentious and not over-scrupulous persons might, and probably would, be induced, from the heat and strife always engendered in such elections, to resort to a bill and an injunction, and thus, for years, thwart the will of the people, which the General Assembly has made absolute in adopting or rejecting this charter for their government. Public policy does not require such a jurisdiction, even if it could sanction it. If the power were admitted, where would its jurisdiction end? Suppose a person were to conceive a law to have been unconstitutionally enacted, could he, by bill, restrain the Governor and all other officers from executing it until a hearing could be had and the law declared valid? Suppose a citizen, in his hostile opposition to a Governor elect, or from other motives, were to conceive that he had obtained his apparent majority by fraud, could he apply to a court for and obtain an injunction

to restrain him from becoming inaugurated, until, by delays and appeals, the term for which he had been elected should expire, and thus defeat the will of the people?

Again, suppose a constitutional convention were called, a constitution adopted and submitted to the people for ratification or rejection, and the vote were in favor of adoption, could a bill be filed to prevent the Secretary of State from canvassing the returns, because fraud was alleged, until the vote of every county could be contested, purged, and new returns were made and a trial were had, after long and vexatious delays?

Can it be said that the two houses of the General Assembly may be restrained, by injunction, from the enactment of laws, because a portion of the members may have procured their seats by fraud, or one or both of the houses have, or are supposed to have, been illegally or even unconstitutionally organized? Can the Supreme and other courts be restrained from proceeding with the business before them because it may be supposed that the judges have obtained their seats by frauds in the election, or some statutory requirement has been omitted? Or may such a course be pursued in a large number of other like cases, which would defeat the will of the people constitutionally expressed? To so hold would be revolutionary. Such propositions can not be maintained, as it would largely give control of the political power of the State to the courts, a department not designed, either directly or indirectly, to exercise or control that power. But it is believed no one would contend for such power in the courts. But the expansive force of precedent may be said to be almost unlimited. A decision is made as an exception to a rule, and soon it is pressed with vigor, as establishing a principle that would embrace cases falling within well defined rules, and, if adopted, would lead to the perversion of justice. Sanction the power in this case as inherent in the court of chancery, could any ingenuity suggest reasons which should forbid the application of the same rule

to every case we have supposed, or any election case where fraud is alleged? In this case, alleged fraud is the ground on which the power is urged; so would it be in those cases, and the fraud would be precisely the same in each.

Whilst the writ of injunction is one of the most important in the law, by affording preventive relief,—in fact, is indispensable to the complete administration of justice,—it is one, from the facility with which it may be obtained, that is liable to great abuse, when granted to temporarily restrain the action of parties until a hearing is had. And the whole tendency seems to be towards its improvident use and consequent abuse. Whilst its use is absolutely essential to the administration of equitable relief, it has its limits, and the policy would not be wise, nor would it promote justice, to extend its use to cases of doubtful right, or to accomplish ends where there are other adequate remedies. The whole tendency of our jurisprudence has been to enlarge its scope, and it is now used in cases where, formerly, no one supposed it could be rightfully applied, and the present tendency is to a point which, when reached, will compel the General Assembly to intervene to restrain the abuses it will produce, and it is all believed to have grown out of the expansion of precedents not infrequently of doubtful correctness.

Having stated these general propositions, we now come to the consideration of the question, whether the court below had power, as contradistinguished from mere equitable jurisdiction growing out of the facts charged in the bill, to award the temporary injunction. To the complete authority to so act, there are several things which are indispensable to enable the court to hear, to determine and decree. There must be a complainant, who must file a bill alleging facts showing that he has an interest in the matter in litigation, or at least to complain, and have relief for others; there must be a matter about which rights are claimed, and that matter must be within the power of the court, when properly before it, to act upon or control it by its sentence, before it can adjudge and

decree that parties shall be restrained from acting in reference to the thing in litigation. If any or either of these essential requirements is wanting, the court can not decree that a restraining order shall issue.

In this case there was a complainant, who had exhibited a bill, and there was a subject matter for litigation, and the controling question is, whether the court, under any circumstances, could have power to hear, determine and decree in reference to it. If not, then the whole proceeding was *coram non judice.*

The law under which this election was held, neither in terms nor by implication confers the power. Nor is it asserted that the court had facts before it which required it to take judicial cognizance, and hear, adjudicate and decree. On the contrary, the court refused to continue the injunction, thus virtually deciding that the court was powerless to afford the relief sought, and thereby permitting the injunction to come to an end by the terms of the order awarding it, and we are clearly of opinion that it was not a case for equitable interposition. The act itself provides, section 57, article 4, p. 217, R. S. 1874, that: "The manner of conducting and voting at elections to be held under this act, and contesting the same, the keeping of poll lists and canvassing the votes, shall be the same, as nearly as may be, as in the case of electing county officers under the general laws of this State." The 98th section of the Election Law (R. S. 1874, p. 464,) provides for the manner of contesting the election of all county officers except the county judge, in the county court. Other sections of the act provide who may contest, how service shall be made, the trial had and conducted, and for the judgment to be rendered.

Thus it is seen there was complete, and, in every way, an ample remedy expressly provided for contesting this election under the statute, but it was not invoked. Hence there could be no pretense of jurisdiction from necessity. The remedy was obvious, plain and simple in its application, and being

ample and complete, there is not the slightest reason why equity should interpose and perform the functions of the county court, where the statute had placed it.

It has been held, that a court of equity has no power to try a contested election, even where the statute has not provided a mode for contesting. See *Moore* v. *Hoisington*, 31 Ill. 243. Elections belong to the political branch of the government, and are beyond the control of the judicial power. It was not designed, when the fundamental law of the State was framed, that either department of government should interfere with or control the other, and it is for the political power of the State, within the limits of the constitution, to provide the manner in which elections shall be held, and the manner in which officers thus elected shall be qualified, and their elections contested. And the political power of the State may organize municipal bodies and put them into operation by the force of enactment, or by election by the people to be thus governed, and they can provide the mode of reviewing the returns of all elections, to ascertain whether they are in accordance with the expressed will of the people. And until the courts are empowered to act, by the constitution or legislative enactment, they must refrain from interference.

But did the court have a general power to hear and determine as to the fairness of the result of elections in this class of cases, on the requisite facts being stated in the bill? If so, then the court had power over the subject matter, although the facts were so defectively stated as to fail to confer jurisdiction in the particular case. We think clearly not, because no state of facts, however stated, could confer power to adjudicate in that class of cases. We are aware of no adjudged case, or text writer, who has ever announced the power as inherent in the courts of equity, to try contested elections between persons claiming an office, or in a case of this character. It is believed that no case can be found, where an English court of chancery has ever tried a contested election where the public were concerned. And such cases are

believed to be of rare occurrence in this country, and then only where the power has been conferred by express enactment or necessary implication therefrom.

The first section of an act creating and defining the power, jurisdiction and practice of courts of chancery, provides that the courts shall have power to proceed in the exercise of their jurisdiction in the mode prescribed by the act; and when there is no provision made by the act, then according to the general usage and practice of courts of equity. Now, it is not the general usage or practice of courts of equity to hear and determine contested elections, and if not, the power is not conferred by the Chancery Act, and none other has been referred to from which it can be derived.

But it is said that this court has held that chancery has power and could take jurisdiction to try a contested county seat election, and therefore such power might be exercised in this class of cases, or rather, this belongs to the same class of cases, and whether or not the facts charged in the bill conferred jurisdiction to hear and adjudicate, there was still the power in that class of cases, and if the power existed, the writ must be obeyed, without regard to what would be the result in the particular case. It is true that, in a number of county seat cases, we have held that chancery might take jurisdiction and hear and determine them. But the power was placed expressly upon the ground that the constitution had provided that county seats should not be removed except on a vote resulting in a majority in favor of a removal; and the General Assembly, in providing for the mode of holding such an election, wholly failed to provide for any means of contesting it. And, to prevent the obstruction and a defeat of the rights of the majority, conferred and intended to be secured to them, it was held, that the fundamental law, by implication, conferred the power on the courts of chancery. But, in making these decisions, it was on that express ground, and those cases thereby became an exception to all other cases. If these decisions recognized them as a class of cases, they

only recognize county seat questions as being embraced in the class, and nothing was intended to be, nor do we think anything was, said which can, by fair intendment, be construed to embrace any other character of election cases. They can not be held to extend the power to other or different cases. The power therein flowed solely and entirely from the constitution.

But in this case there is no pretense that this or like elections were required to be held by any provision of the constitution, nor that the statute had not provided a means for contesting them. Hence this case lacks these essential elements to bring it within the scope of those decisions. Being an exception to all other cases or classes of cases, they afford no precedent, nor do they establish any principle that can embrace this case, or in the remotest degree affect or control its decision.

It then follows, if what we have said is correct, that the court below had no power to hear and adjudicate in this class of cases. And having no power under any head of his jurisdiction, the chancellor acted wholly without power to entertain the bill for any purpose, or to award the writ of injunction. Wanting both power and jurisdiction to entertain the bill or award the writ, it was a nullity, which could legally operate on no one, nor was any one bound to yield obedience to its requirements. Having been issued without power, it was as inefficient as if it had been issued without any bill presented, or as though no person had ever asked for it. Not having power, the writ was no more binding than would be a decree in a criminal case, and for the same reason, the want of power.

Where power to take judicial cognizance is wholly wanting, all power to judicially bind or affect the rights or interests of parties is wanting; and whilst the powers of the chancellor are great and expanded, still they have their limits, and, when transcended, all acts beyond the limit are abso-

lutely void, and can have no binding effect, and the awarding of this writ falls within, and is of that character.

In the case of *The People* v. *The City of Galesburg*, 48 Ill. 486, it was held that a court of chancery had no power to enjoin the holding of an election.

Again, in the case of *Moore* v. *Hoisington*, 31 Ill. 243, it was held that a court of chancery has no power to try a contested election, even where the statute had provided no mode of contesting.

In *Walton* v. *Develing*, 61 Ill. 201, it was held, where an injunction was issued to restrain officers from holding an election, and it was disobeyed, that they were not amenable to the process or liable to be punished for a contempt in disobeying the writ. And it was upon the grounds that the writ was void for the want of power, and the law required the officer to perform this particular duty. The distinction was there taken that, where the court has power over the subject matter, and authority to take such jurisdiction, and the court acts, its process must be obeyed; but where the power is wholly wanting, then the process is void, and need not be obeyed. The same rule was recognized and applied in *Darst* v. *The People*, 62 Ill. 306. So the doctrine is by no means novel in this court.

It is true that officers and others may be embarrassed as to their course of action in such cases. They must act at their peril under all such circumstances. They can, as the parties did in this case, call to their aid able counsel, learn their duty from all available sources, and then act and abide the consequences. If the advice they procure be wrong, it will be their misfortune, and the incorrect advice will not excuse the offense or mitigate the punishment.

We have confined ourselves to the adjudged cases in our own court, and to general and well recognized legal and equitable principles, not only because we regard them as settled, but because we do not in the least doubt their entire correctness. Hence we have not reviewed the numerous authorities

of other courts and text writers incidentally bearing on the question presented in the very elaborate and unusually able arguments of counsel. But, notwithstanding their industry, research and ability, we have been irresistibly impelled to reach the result here announced.

The entire record considered in the light of the arguments, we must say that the court below transcended its powers in awarding the writ, and, as a consequence thereof, in fining the defendants as for a contempt of the process of the court and the authority of the State; and the several judgments imposing such fines must be reversed.

Judgments reversed.

ELIAS WENGER

v.

MARSHALL CALDER.

1. MEASURE OF DAMAGES—*malpractice.* In a suit against a surgeon for malpractice in treating an injury, the plaintiff is not entitled to recover anything on account of pain and suffering caused by the injury, but only for such additional pain and suffering as is produced by the negligence or want of skill of the defendant in the treatment.

2. INSTRUCTIONS—*erroneous, if not based upon evidence.* In an action against a surgeon for malpractice, where there is no evidence tending to prove wilful negligence. it is error to instruct the jury that they may find for the plaintiff in any amount they deem proper, under the evidence, if they believe, from the evidence, that the defendant was wilfully negligent.

APPEAL from the Circuit Court of Kankakee county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

Messrs. BLADES, KAY & EVANS, for the appellant.

Messrs. BARNES & MUIR, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action brought against the defendant for alleged malpractice, as a physician and surgeon, in the treatment of a dislocation of the elbow of the plaintiff. The plaintiff recovered a verdict and judgment for $1500 damages.

The court below gave to the jury this instruction, on behalf of the plaintiff:

"13. The rule of damages in this case, if you find for the plaintiff, is the pain and suffering undergone by the plaintiff, and any permanent injury to the arm shown by the evidence, and consequent pecuniary loss, for life, after the time of the plaintiff's coming of age."

This instruction was palpably erroneous. The injury which the plaintiff originally received to his elbow, was not produced by any agency or fault of the defendant, and there is no reason why he should be held to pay for the pain and suffering caused thereby. If there were any additional pain and suffering which the plaintiff underwent, because of the want of reasonable care and skill in the treatment, that might have been considered by the jury in assessing damages—nothing more. And there should have been the same limitation in the respect of any permanent injury to the arm.

Several other of the instructions for plaintiff are liable to the same objection.

This instruction was given for the plaintiff:

"14. If you believe, from the evidence, that the defendant, as surgeon, treated the arm of the plaintiff, and failed to use reasonable care and skill in so treating it, and if you belive, from the evidence, that the defendant was wilfully negligent in failing to use reasonable care and skill in treating the arm, then you may find for the plaintiff any sum you deem proper, under the evidence, not exceeding $10,000."

There was no evidence tending to prove that the defendant was wilfully negligent. The instruction was, in this respect, wholly irrelevant, and calculated to mislead the jury, and erroneous. The same objection lies to the seventh instruction.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

JAMES THOMPSON

v.

FREDERICK BULSON.

1. FENCES—*notice must be given of the selection of viewers, to charge party in default with costs.* If one of the owners of a division fence shall neglect to keep his portion in repair, the other owner can not, without notice to him, select both fence viewers, and charge him with all the costs of the view. The party not notified will not be bound by the action of the viewers, and therefore will not be liable for any expenses on their account.

2. CONSTRUCTION OF STATUTES. A section of a statute will be construed with reference to the provisions of other sections relating to the same subject, and so as to leave all the words in the different sections in full effect according to their ordinary and usually accepted meaning.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was a suit brought by Frederick Bulson against James Thompson, to recover for the expenses paid by the plaintiff to fence viewers.

It appears from the record that the plaintiff made the following complaint to two fence viewers of his town:

"In compliance with a statutory act, approved March 21, 1874, in force July 1, 1874, I hereby enter complaint, that that part of a division fence between the lands of James Thompson and my own that has, according to law, been

assigned to said James Thompson to build and keep in repair, is insufficient, and I hereby demand that the proper legal steps be immediately taken to secure the rebuilding of said line fence. Said division fence is described as follows," etc.

"[Signed] FREDERICK BULSON."

The fence viewers caused the following notice to be served upon the defendant:

"*To James Thompson:*

"You are hereby notified that complaint having been made by Frederick Bulson to the undersigned, fence viewers of the town of Victoria, in Knox county, and State of Illinois, that you have neglected to repair and rebuild your part of the division fence on the line between your land and said Bulson's land, your part being (giving a description of the fence), we shall meet on the 24th day of October, 1874, at the hour of ten o'clock A. M., and proceed and examine said fence, with a view to such action in the premises as the case shall require.

"Dated October 13, 1874.

"D. H. GOODSPEED,
"R. J. WILBUR,
"*Fence viewers.*"

The fence viewers met at the time named in the notice, and decided that Thompson should repair his part of the fence, and caused a notice of their decision to be served on him. The plaintiff also served a written notice on the defendant to repair his fence within ten days. The plaintiff paid the fence viewers and the constable their charges, and brought this suit to recover the same of the defendant.

The cause was tried by the court without a jury, who rendered judgment against the defendant for $11.70, and the defendant appealed.

Messrs. HANNAMAN & WILLOUGHBY, for the appellant.

Mr. HOMER GAINES, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The question here is, if one of the owners of a division fence shall neglect to keep his portion of the fence in repair, can the other owner, under the provisions of chap. 54, R. L. 1874, entitled "Fences," without previous notice to him, select both fence viewers, and charge him with all the costs of the view?

A brief reference to several sections of the statute will, in our opinion, furnish an answer. It provides—

By section one: In counties under township organization, the town assessor and commissioners of highways are *ex officio* fence viewers in their respective towns. In counties not under township organization, the county board appoints three fence viewers for each precinct.

By section five: The value of the division fence, and the proportion thereof to be paid by the person availing of it, when it has been built by another, and the proportion to be made and maintained by each, when adjacent owners inclose their lands, shall be determined by two fence viewers.

By section six, upon which appellee bases his claim: "If any person neglect to repair or rebuild a division fence, or portion thereof which he ought to maintain, any two fence viewers of the town or precinct shall, on complaint of the party aggrieved, after giving due notice to each party, examine such fences, and if they deem the same to be insufficient, they shall so notify the delinquent party, and direct him to rebuild the same within such time as they may deem reasonable."

By section seven: "If disputes arise between the owners of adjoining lands, concerning the proportion of fence to be made or maintained by either of them, such dispute shall be settled by any two of the fence viewers of the town or precinct, as the case may be," etc.

By section eight: "When any of the above mentioned

matters shall be submitted to fence viewers, each party shall choose one; and if either neglect, after eight days' notice in writing, to make such choice, the other party may select both."

The language of this section seems to us clearly to embrace the cases specified in each of the preceding sections, wherein the selection of viewers is contemplated, and there is, to our apprehension, no reason why we should attempt to give the words a strained and unusual construction to sustain a contrary view.

The words, "any two fence viewers of the town or precinct shall, on complaint of the party aggrieved," etc., in the sixth section, which, taken by itself, might seem to indicate the right of the complaining party to select the viewers, are to be considered with reference to the other portions of the statute relating to the same subject, and when this is done, it is plain their meaning will be correctly expressed thus: "Any two fence viewers of the town or precinct, when selected as provided by section eight, shall, on complaint of the party aggrieved," etc. This does no violence to the language employed; it merely supplies what is understood, and it leaves all the words in the different sections in full effect, according to their ordinary and usually accepted meaning.

Moreover, it is indispensable to the effectiveness of a tribunal of this description, that some mode of reaching a decision shall be provided when the two viewers are unable to agree. This is provided alone by the ninth section, the language of which, in so many words, shows the viewers are, in the first instance, to be selected as provided by the eighth section. It is: "The two fence viewers *so chosen* shall examine the premises and hear the allegations of the parties. In case of their disagreement, they shall select another fence viewer to act with them, and the decision of any two of them shall be final to the parties to such dispute, and upon all parties holding under them."

We are unwilling to believe that it was the design of the

legislature, in providing that controversies in regard to fences shall be decided by a less number than all the viewers of the town or precinct, the party complained of shall be denied the right of participating in the selection of those to whom the controversy is to be submitted, when it relates to repairing fences, but allowed the right when the controversy relates to the portion of the fence to be made and maintained by the respective parties. Such a distinction is unreasonable, and it would work manifest injustice to the party complained of in regard to repairing fences. If such had been the design, it would surely have been expressed in language far different from that we have considered, and so clearly as to leave no excuse for construction.

Our conclusion is, since the viewers were selected without previous notice to appellant, and by appellee only, appellant is in nowise bound by their action, and, consequently, liable for no expenses on their account.

The judgment is reversed.

Judgment reversed.

HOLLIS CUMMINGS *et al*

v.

ALLEN B. BURLESON *et al.*

1. HOMESTEAD—*how set off on decree of foreclosure of mortgage.* The statute not having, in terms, pointed out the particular manner in which a court of chancery shall proceed to set off a homestead, where it becomes necessary to enforce a lien in equity on the premises, it is proper to adopt the mode provided by the statute when an officer holds an execution.

2. It is proper in a decree of sale upon foreclosure of a mortgage, to direct the master in chancery "to proceed, according to law, to summon three householders, as commissioners, who shall, upon oath, administered to them by such master, appraise the value of the premises in which homestead is claimed, and if the premises can, in their opinion, be divided without injury to the interests of the parties, to set off so much thereof,

including the dwelling house, as shall be worth $1000, and that the master sell the residue of said premises."

3. In summoning such commissioners, the master acts as an officer of the court, for and on behalf of all the parties to the proceeding, and need not consult the owner of the premises in selecting such commissioners.

4. INJUNCTION — *assessment of damages on dissolution.* Where the sale of premises by a master in chancery was enjoined, it was proper, in assessing damages on the dissolution of the injunction, to include the costs of advertising the sale, and a reasonable solicitor's fee for defending the injunction suit.

WRIT OF ERROR to the Circuit Court of Carroll county; the Hon. W. W. HEATON, Judge, presiding.

Messrs. ARMOUR & SHAW, for the plaintiffs in error.

Mr. C. B. SMITH, for the defendants in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought to enjoin the sale of certain premises under a decree, on the ground that the land decreed to be sold was the homestead of the complainant, and that the homestead had not been set off in the mode required by law.

To the bill a demurrer was filed, which the court sustained, dissolved the injunction, dismissed the bill, and assessed damages, in the sum of $34.60, against the complainant, for a wrongful suing out of the injunction.

It appears, from the allegations of the bill, that, at the April term, 1874, of the circuit court of Carroll county, Allen B. Burleson obtained a decree against Hollis Cummings and others, foreclosing a certain mortgage, which had been given by Cummings to the Racine and Mississippi Railroad Co., to secure a debt due and owing from the said Cummings. The mortgaged premises were occupied by Cummings as a homestead.

The decree of foreclosure, among other things, contains the following provision:

"That in default of the payment of said sum of $2297.77, interest and costs, by the said Hollis Cummings to the said complainant, as aforesaid, the master in chancery of this court shall proceed, according to law, to summon three householders, as commissioners, who shall, upon oath, to be administered to them by the said master, appraise the value of said premises, exclusive of said one-tenth of an acre occupied by said Western Union Railroad Company; and if, in the opinion of said commissioners, said premises may be divided without injury to the interests of the parties, they shall set off so much of said premises, including the dwelling house, as, in their opinion, shall be worth $1000, and the residue of said premises shall be advertised and sold by said master, in the manner hereinafter provided."

Under and by virtue of the decree, the master in chancery summoned three men, to act as commissioners, to appraise the premises, and to set off to Cummings a homestead.

These commissioners, after having been sworn as required by law, went upon the premises and appraised the same, and set off to Cummings a certain portion thereof, including the dwelling house, as a homestead.

It is not claimed that the commissioners selected by the master in chancery were incompetent men, or that they acted partially or corruptly, but the theory of the complainant, as we understand it, is, that he had the right to participate in the selection of the commissioners, and that he should have been notified of the meeting of the commissioners, and that it was his right to appear before them, and introduce evidence in regard to the value of the premises out of which a homestead was to be assigned.

It will be observed that the statute does not, in terms, provide the particular manner in which a court of chancery shall proceed to set off a homestead, where it becomes necessary to enforce a lien in equity upon the premises.

Section 8, Revised Laws of 1874, page 498, declares: "In the enforcement of a lien in a court of equity upon premises,

including the homestead, if such right is not waived or released, as provided in this act, the court may set off the homestead and decree the sale of the balance of the premises."

Where a judgment has been rendered in an action at law, and the sheriff holds an execution, and the premises sought to be sold are claimed as a homestead, the mode of proceeding is clearly pointed out by section 10, page 498, of the statute, in the following words:

"If, in the opinion of the creditors or officer holding an execution against such householder, the premises claimed by him or her as exempt are worth more than $1000, such officer shall summon three householders, as commissioners, who shall, upon oath, to be administered to them by the officer, appraise said premises; and if, in their opinion, the property may be divided without injury to the interest of the parties, they shall set off so much of said premises, including the dwelling house, as, in their opinion, shall be worth $1000, and the residue of said premises may be advertised and sold by such officer."

The court, by its decree, adopted the mode provided by the section of the statute last cited, where an officer holds an execution, and in this we perceive no error.

It is but fair to presume, that, where the legislature directed a particular mode of procedure where an execution was held by a sheriff, and, in certain cases, empowered a court of equity to set off a homestead, the act being silent as to the manner of proceeding by the court, it was the intent that the same course should be pursued, so far as was practicable, by the court, through its master in chancery, as was required by the sheriff under section 10 of the act.

The result to be obtained under either section of the statute is the same—the rights to be guarded and responsibilities incurred are as great under one section as the other. Under section 10 the sheriff proceeds as a sworn officer of the court; under section 8 the master in chancery, who is likewise an officer of the court, acts under the sanction of his official oath.

We are satisfied the mode adopted by the court was in harmony with the statute, and one, too, not calculated in the least to abridge any of the legal or equitable rights of the complainant.

Should the commissioners selected by the master in chancery disregard their oaths, and, in the discharge of their duties, act corruptly or partially, the complainant would have had a complete and ample remedy, by application to the court, by motion to set aside their report.

Under the mode of procedure, therefore, adopted by the court, the rights of the complainant were in no manner infringed upon.

There is no force in the position of the complainant that he had no voice in the selection of the commissioners who set off the homestead. The statute did not require the master to consult him in selecting the commissioners.

The complainant in the original decree had no voice in their selection. The master in chancery, an officer of the court, whose every act was subject to the approval or rejection of the court, acted as a disinterested officer for and on behalf of each of the parties in interest. It was his duty to select as commissioners men of integrity and good judgment. This, so far as appears, he did, and, so far as we are able to perceive from the allegations of complainant's bill, he has no just ground of complaint.

In regard to the damages assessed by the court against the complainant on the dissolution of the injunction, in that we see no error. It was shown that $25 was a reasonable solicitor's fee for defending against the bill, and the advertising of the premises for sale had cost $9.60. The amount allowed was made up of these two items, and properly so.

The decree of the circuit court will be affirmed.

Decree affirmed.

FRANKLIN HADAWAY

v.

ZEPHENIAH KELLY.

1. ARBITRATION. The finding of arbitrators, like that of a court, must be regarded as embracing all matters submitted to them, and, unless impeached in some manner known to the law, is conclusive of the rights of the parties.

2. The law, in the absence of proof of fraud, will presume the arbitrators considered all the evidence, and allowed such items to the respective parties as they considered proved.

APPEAL from the Circuit Court of Whiteside county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Mr. F. D. RAMSAY, for the appellant.

Mr. WM. H. ALLEN, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

During the pendency of this cause in the circuit court, the parties agreed to refer all matters in difference between them to arbitration, which was done. The arbitrators chosen, after hearing the evidence offered, made their award in writing, which was duly presented to the court, when appellant moved to set it aside, on the ground it had been obtained by undue means and misbehavior on the part of the arbitrators and of appellee, which motion the court overruled, and entered judgment in favor of appellee for the amount named in the award.

We have examined with sufficient care the affidavits filed in support of the motion, but are unable to discover any evidence whatever that any undue means "was used by any one to procure the making of the award," or any evidence of any misbehavior on the part of the arbitrators. There is absolutely nothing in this record that casts the least suspicion

upon the conduct of any of the arbitrators, or any party interested in the matter.

Complaint is made, the arbitrators failed to allow some items in appellant's account that the evidence clearly established in his favor, but that is a matter that can not be inquired into in this way. The law, in the absence of proof of fraud, will presume the arbitrators considered all the evidence, and allowed such items to the respective parties as they considered proven. Their finding, like that of a court, must be regarded as embracing all matters submitted to them, and, unless impeached in some manner known to the law, must stand as conclusive of the rights of the parties.

There is no reason whatever shown for setting aside the award, and the judgment must be affirmed.

Judgment affirmed.

JOHN T. MORGAN *et al.*

v.

DAVID R. STEVENS.

1. NUNCUPATIVE WILL. The provisions of a statute in regard to nuncupative wills must have a rigid and strict construction, and must be strictly enforced by courts.

2. SAME—*what the proof of, must show.* The testamentary capacity and the intention to make a will at the time of the alleged nuncupation must appear by the clearest and most indisputable testimony; and it must further appear, that the proof embodies the real testamentary intention of the deceased, in order to establish a nuncupative will.

3. SAME—*requirements of the statute.* It is essential to the establishing of a nuncupative will under the statute, that it shall be made in the last sickness of the testator, and that it shall be proved by two or more credible witnesses, who were present at the speaking and publishing thereof, who shall state, on oath, that they were present and heard the testator pronounce the words, and that they believe him to have been of sound mind and memory; and that he did, at the time, desire the persons present, or some of them, to bear witness that such was his will. And at least two witnesses must concur as to all these facts.

4. Where there were but two witnesses present at the time of the alleged speaking and publishing of a nuncupative will, and they both testified to all the facts required by the statute except the fact as to their being requested by the testatrix to bear witness that the words spoken were her will, upon which fact they differed, one saying that such request was made and the other that it was not: *Held*, that the requirements of the statute were not fulfilled, and the will was not established.

5. Where the proof showed that the testatrix, during her last sickness, said that she wanted her husband to have her property, and at the same time said that she wanted another person to have something, and that she would finish or fix it to-morrow, and she lived six days afterwards, and was all the time in a condition to make a will in writing, the words so spoken under such circumstances do not amount to such a declaration as should be admitted to probate as a nuncupative will.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. JOHN PORTER, Messrs. DOUGLAS & HARVEY, and Mr. JOHN T. MORGAN, for the appellants.

Messrs. STEWART & PHELPS, and Mr. JOHN J. GLENN, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

These proceedings originated in the county court of Warren county, wherein the nuncupative will of Angeline Stevens, deceased, was presented for probate. Probate thereof was refused, and an appeal taken to the circuit court.

In the circuit court an issue of fact was made up as to the execution of the will, which was found for the proponents of the will, the order of the county court reversed, and the cause remanded to that court, with directions.

To reverse this judgment, the contestants of the will appeal, and their assignment of error brings before us the whole merits of the controversy.

As we gather from text writers of acknowledged authority, and from the decisions of respectable courts, it is a cardinal principle that the provisions of the statute in regard to nun-

cupative wills must have a rigid and strict construction, and must be strictly enforced by courts. At this day, in England and in many of the States of our Union, the privilege of making such wills is restricted to soldiers in active military service, and to mariners at sea. It is said by Blackstone, in his Commentaries, by the Roman law a soldier's will traced in the sand by the point of his sword, done at the approach of battle, was a good disposition of his personalty. The reason given to sustain such a will, and, indeed, almost all nuncupative wills, is, that the testator, by being *in extremis,* had not time to make a more deliberate will or a written will. Chancellor KENT, in the great case of *Prince* v. *Hazleton,* 20 Johns. 502, said, it had become the acknowledged doctrine that a nuncupative will is only to be tolerated when made *in extremis.* It is the received doctrine, that the testamentary capacity and the *animus testandi,* at the time of the alleged nuncupation, must appear by the clearest and most indisputable testimony, and that the proof embodies the real testamentary intentions of the deceased.

Our statute upon the subject does not, in so many words, declare the nuncupation must be made whilst the testator is *in extremis,* but only that it shall be made in his last sickness; but it requires it shall be proved, by two or more credible witnesses, who were present at the speaking and publishing thereof, who shall declare, on oath or affirmation, that they were present and heard the testator pronounce the said words, and that they believed him to be of sound mind and memory, and that he or she did, at the time, desire the persons present, or some of them, to bear witness that such was his or her will, or words to that effect.

The will, as presented for probate, is as follows: "I want David to have my property. He is the best friend I have got. He is poor, and needs it. My brothers have enough. I have property coming from my father, and I want David to have it. I want him to have the things, too, that are in our house. I want to give Kate something."

The affidavit in proof of this will is as follows: Personally appeared, in open court, Aaron Humphrey, M. D., and Sibyl Putnam, witnesses to the foregoing instrument of writing, purporting to be the last will and testament of Angeline Stevens, late of Warren county, deceased, who, being duly sworn, according to law, do depose and say, each for himself, that the foregoing is the last will and testament of the said Angeline Stevens, deceased; that they were present at the speaking and publishing thereof; that they were present and heard the testatrix pronounce the said words; that they believed her to be of sound mind and memory; that she did, at the time, desire them to bear witness that such was her will, or used words to that effect; (these words are then interlined, "telling us that if she died she wanted us to know that was her will,") and that said will was made in the time of the last sickness of the testatrix, the said Angeline Stevens; that she died on the twenty-third day of March, A. D. 1872; and that the person of whom she was speaking, and whom she called David, was her husband, David Stevens; and that said will was reduced to writing within less than twenty days from the speaking thereof.

Sibyl Putnam was the attending nurse of the deceased, and she states, the words composing the will were spoken by the deceased on Sunday night, the 17th of March, and that Dr. Humphrey was present. She further testified, the deceased said, at the same time, "she would fix it in the morning," and the same testimony is given by Dr. Humphrey. He states, he heard her speak about her property; she said she wanted David to have it, but she wanted Katie to have something; that she would finish it in the morning.

Dr. Humphrey, it appears, did sign the affidavit and affirm to it, under oath, in the county court, with the interlineation therein contained; but, in the circuit court, he testified, positively, that the words interlined were not said in his hearing by the deceased; that she said nothing about making a will; that she did not request either Miss Putnam or himself to

remember that they were witnesses to her will. She did not use the word will in all the conversation.

Here, then, is a direct conflict between these witnesses, and they are the only witnesses on the point, testifying in the case.

We would infer from the testimony of Dr. Humphrey, that the deceased had not, at the time spoken of, any intention to make a testamentary disposition of her property. She was conning about it, and, as a sick person in her condition would be apt to say, she wanted her husband to have it, but could not have supposed she was then making her will, for in the conversation she said: "I want to give Kate something," adding, she would finish it to-morrow. It is impossible to hold, here was such a nuncupation as the statute contemplates. There was no *rogatio testium*, for that is positively denied by the attending physician. According to his testimony, neither he nor Miss Putnam, the only persons in the room, were called for any such purpose. That the deceased did not suppose she was making a disposition of her property, is manifest from the fact that she had Kate in her mind as an object of her solicitude, declaring that she must have something, and she would fix it or finish it in the morning.

The deceased lived six days after this alleged nuncupation, and was all the time in a condition to make a will in writing, and provide for her husband and Kate. There was nothing to prevent it, and no necessity or urgency is shown for making these alleged declarations.

We are satisfied the testimony is not of that clear character that should be required in proving wills of this kind, nor does it come up to the requirements of the statute, no two witnesses having testified to such facts as are required by the statute to be established, before such a will can take effect.

The jury found contrary to the law and the evidence, and the court, in rendering judgment on the verdict, erred.

The judgment must be reversed.

Judgment reversed.

SAMUEL S. GARDNER *et al.*

v.

SAMUEL I. RUSSELL.

1. PLEADING. If a replication is to a plea not in the record, it might properly be stricken from the files, but it would be no ground of demurrer.

2. BILL OF EXCEPTIONS—*when necessary.* If a trial is had in the court below, of a cause, out of its order, and before its time on the docket, all that was done should be embodied in a bill of exceptions and made a part of the record, in order to have the proceeding reviewed in the Supreme Court.

3. This court can not presume that the court below committed an error. Until overcome by the record all the proceedings in the court below will be presumed to conform to the law, and it is for the party alleging error to show it.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. CHESTER KINNEY, for the appellants.

Messrs. VALLETTE & GARDNER, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee brought an action of assumpsit against appellants in the Superior Court of Cook county, on two promissory notes for $500 each, dated November the 10th, 1873, one due June 10th, 1874, and the other on the 10th of August, 1874.

The defendants pleaded the general issue, and special pleas separately, averring breach of warranty and failure of consideration, and filed an affidavit of merits. Replications were filed to the special pleas, and defendants demurred, and the court overruled the demurrer, and the defendants asked leave to rejoin, but the court denied the motion.

It is urged, the court erred in overruling a demurrer to appellee's replications. But we presume no great stress is placed on the objection, as the replications are not set out in the

abstract, nor are the defects pointed out in the brief. It is true, it is said that they are double, but we are not referred to what constitutes the duplicity.

Even if it be true that one of the replications is to an imaginary plea, or one not in the record, we fail to see that it would be a ground of demurrer. If there was no plea in the case to which it was replicable, it might properly have been stricken from the files, but as it was, it was merely superfluous and could have worked no injury to appellants. There was no error in this.

It is urged, as the main ground of reversal, that the case was tried out of its order and before its time on the docket.

The record fails to show that such was the fact. It shows that there was an order entered for a speedy trial, but there is nothing appearing from which it can be inferred that this order was ever carried into effect. If such a trial was wrongfully had, all that was done should have been embodied in a bill of exceptions, and made a part of the record. We can not presume that the court below committed an error, but if it did, it must appear from the record. Until overcome by the record, we must presume that all of the proceedings in the court below conform to the law, and it is for the party alleging error to show it. In this case there is no bill of exceptions, and we must presume that the case, notwithstanding the order for a speedy trial, was had in its regular order, or if not, that the circumstances warranted a trial when it was had.

Perceiving no error in this record, the judgment of the court below is affirmed.

Judgment affirmed.

Syllabus.

JOSEPH KROER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. CRIMINAL LAW—*indictment for keeping tippling house open on Sabbath.* An indictment under section 127 of the Criminal Code of 1845, which charges that the defendant, on the 10th day of March, 1874, the same being the Sabbath day, in the night-time of said day so being the Sabbath day, did unlawfully keep open a tippling house, etc., is sufficient, and a motion to quash should be overruled.

2. This statutory offense might be committed during the time embraced between the preceding midnight and the dawn of Sabbath morning.

3. KEEPING OPEN TIPPLING HOUSE *on the Sabbath — what constitutes.* On the trial of a party indicted for keeping open a tippling house on the Sabbath day, the court was asked to instruct the jury that it must be shown by the evidence that the house was kept open for tippling purposes, as on week days, before the defendant could be convicted; but the court modified the instruction by omitting the words "as on week days:" *Held*, there was no error.

4. It is not necessary, to constitute the offense under the statute, that the house be kept open as on week days. It will be within the offense named if it is so kept that access may be had thereto on the Sabbath, and facilities afforded for the obtaining of intoxicating drinks, and it is not material whether the access is by the front door or back door, or whether the door is kept open or is only opened on application for admittance.

5. JUROR—*competency.* It is not ground of challenge, on the trial of one indicted for keeping open a tippling house on the Sabbath day, that a juror has a bias or feeling against persons engaged in the business of saloon keeping, and a prejudice against the selling of liquors, when he states that such feeling and prejudice would not influence his judgment, and that his feeling and prejudice was against the business, and not against the persons engaged in it, and that he would do the defendant justice.

6. SEVERAL JUDGMENTS *on different counts.* Where a defendant was found guilty upon two counts in an indictment, one for keeping open a tippling house on the Sabbath day, and one for keeping open a tippling house on Sabbath night, it was proper to render a several judgment on each count.

WRIT OF ERROR to the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. J. M. BAILEY, and Mr. J. I. NEFF, for the plaintiff in error.

Mr. JAMES S. COCHRAN, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an indictment for keeping open a tippling house on the Sabbath day and night, under section 127 of the Criminal Code of Rev. Stat. 1845. The defendant was convicted upon the first and fifth counts of the indictment, the first charging him with keeping open a tippling house in the day-time of the Sabbath day, the fifth with keeping it open in the night-time of the Sabbath day.

It is assigned for error—

1st. That the court below refused to quash the fifth count of the indictment.

The language of the aforesaid section, so far as relates to this offense, is: If any person, etc., shall keep open any tippling house on the Sabbath day or night, etc., every such person shall, on conviction, be fined, etc. The fifth count charges that the defendant, on the 10th day of March, 1874, the same being the Sabbath day, in the night-time of said day so being the Sabbath day, did unlawfully keep open a tippling house, etc. The objection taken is, that the words "Sabbath night" mean the period of night or darkness *following* the Sabbath day; that the period between midnight preceding the Sabbath and the dawn of Sabbath morning, is a portion of the night-time of the Sabbath day, yet it is not any portion of "Sabbath night," whence it follows that the averments of this count may be true, and still the defendant be guilty of no offense under the statute.

We do not accede to the construction that this statutory offense could not be committed within that period of time

embraced between the preceding midnight and the dawn of Sabbath morning. We think it might be, and consequently the objection fails. We do not consider that the averments in this count could be true, and yet there have been no violation of the statute. The motion to quash was properly overruled.

2d. That the court below erred in overruling defendant's challenge for cause to the juror Fowler. The juror, on examination upon his *voir dire*, testified that he had a feeling or bias against persons engaged in the business of saloon keeping; that he had a prejudice against the selling of liquors; that, notwithstanding this feeling, he could do the defendant justice—it would not influence his judgment; and further, on examination by the State's Attorney, that he had no prejudice or feeling against the persons who sell and are in the business; that it was the business; he had no feeling against the persons.

The juror's feeling of aversion was only to the traffic in intoxicating liquors. Defendant was not entitled to have a jury of such persons as entertained the contrary feeling. He might as well have insisted upon having a jury composed of persons holding lax notions upon the subject of the observance of the Sabbath day. It did not appear that the juror had formed an opinion of the guilt of the defendant, or that he entertained a prejudice against him. The juror was competent. *Thomson* v. *The People*, 24 Ill. 60; *Leach* v. *The People*, 53 id. 311; *Musick* v. *The People*, 40 id. 268. In the last cited case, one of an indictment for the larceny of a horse, a juror's admission that he was prejudiced against persons guilty of stealing horses, was held not to disqualify him.

3d. That the court erred in giving instructions on behalf of the prosecution, and in modifying defendant's instructions.

The court instructed, on behalf of the people, that, if the defendant kept a drinking saloon for the sale of ale, beer or

strong and intoxicating drinks, by the glass or drink, and that Byron Goddard, John Schneller and Philip Schneller, or other person or persons, had free access thereto, and bought and drank ale, beer or other intoxicating liquors therein in the night-time of one or more Sabbath days, etc., that such is a keeping open of a tippling house, etc.

The following instruction, asked by the defendant, the court modified by adding thereto the words printed in *italics:*

"10. Even if the jury should believe, from the evidence, that the defendant, on a Sunday within eighteen months prior to the finding of the indictment in this case, opened the door of his saloon and admitted one or more persons then and there applying for admission, and immediately closed said door, and that such persons, after remaining in said saloon for a few minutes, were allowed, by the defendant, to depart from said saloon, such opening did not amount to keeping open a tippling house on Sunday. *This is so, unless the jury believe, from the evidence, that the persons so admitted by the defendant, or some of them, bought and drank beer, whisky, gin or some other intoxicating or spirituous liquors therein.*"

And the following one was modified by striking out the words printed in SMALL CAPITALS, and inserting those in *italics:*

"11. The jury are instructed, that merely opening the door of the defendant's saloon on Sunday, *without selling intoxicating liquors therein*, does not constitute an offense under the statute, but the prosecution must show that said saloon was kept open on Sunday, (AS ON WEEK DAYS), for tippling purposes, before the defendant can be convicted of the offense charged in the indictment."

From the objections taken and urged in respect to the action of the court upon these instructions, it would seem to be the view of appellant's counsel that, to make the offense under the statute of keeping open a tippling house on the Sabbath

day, the house must be kept open in the same manner as on week days, and stress is laid upon the literal wording of an expression made use of in the opinion in the case of *Patten* v. *City of Centralia*, 47 Ill. 371, as countenancing such view. It was there said, in reference to such tippling house: "It must be kept open, as on week days, for tippling purposes." But the purport of that decision is mistaken, if it is supposed to be that the tippling house must be kept open in the same manner as on week days. The meaning was, that the object or purpose for which the house shall be kept open on Sundays shall be the same as on week days, *i. e.* for tippling purposes.

We understand that a tippling house will be kept open on the Sabbath day, within the meaning of the statute, where it is so kept that access may be had thereto on the Sabbath day, and facility afforded for the obtaining of intoxicating drinks. It is not necessary that the house should be kept open in all respects, its front door and its windows, as on week days. It is not material whether the entrance afforded be at the front door or at a back door; whether the door be kept open for admittance, or a closed door is opened for admission on application; or whether admittance be gained by a way known to the *general public or not.* It is sufficient that admittance be afforded to those who apply for admission, and that they are there accommodated with the beverages furnished at a tippling house.

The instruction for the people may be open to criticism, as not being strictly accurate in saying, in effect, that, if any one person had free access to the defendant's saloon, and bought and drank intoxicating liquors therein, there was a keeping open of the tippling house. That would be evidence from which to infer the saloon was kept open, but it might not, perhaps, properly be said, as matter of law, to be the keeping it open.

But the evidence was, that, on different Sabbath days and nights, several persons at each time—although they gained admission by a back way and door—were present together in defendant's saloon, drinking intoxicating liquors, and that

the defendant was there behind the bar, selling and handing out the drinks. In view of the evidence in the case, we can not say that there was any material error in the instructions given on behalf of the people.

We see no error in the modification of defendant's instructions.

4th. That the court below erred in imposing upon the defendant two fines of $75 each for each offense.

Plaintiff's counsel question the power of the court, in cases of misdemeanors, where the indictment contains several counts, and the defendant is found guilty on more than one count, to impose more than one punishment. The language of the statute prescribing the punishment is: "Every such person shall, on conviction, be fined not exceeding one hundred dollars, or imprisoned not exceeding six months."

The judgment in this case is a several judgment upon each of the two counts under which the defendant was convicted, that he pay a fine of $75 for the offense charged in each count.

The practice has prevailed in this State, in prosecutions for the sale of spirituous liquors without license, to join several distinct offenses in different counts in one indictment, and to assess a several fine under each count whereon there is a conviction. In *Borschenious* v. *The People,* 41 Ill. 236, this practice was approved and commended as a far better one than to compel the State's Attorney to encumber the dockets and records of the courts with a separate indictment for each offense under the statute. We see no reason why the same rule of practice should not obtain in prosecutions of the present character. A difference of phraseology in the two cases, in the language of the statute prescribing the punishment, is adverted to as affording warrant for a difference in practice, the language, in the case of the unlawful sale of spirituous liquors, being, in the former statute upon the subject, that the person offending "shall, on conviction, be fined, for every offense, ten dollars."

On account of this difference of phraseology in the statutes in the two cases, we perceive no reason for a distinction to be made in the particular now under consideration.

Without adverting to anything more, it is sufficient to say, that, under the long sanctioned practice in this respect referred to, which has been specially commended by this court for observance, the judgment, in the form it is rendered, should be upheld.

The judgment will be affirmed.

Judgment affirmed.

THE CHICAGO AND PACIFIC RAILROAD COMPANY

v.

MARION MUNGER.

1. ABATEMENT—*plea in, must give a better writ or declaration.* A plea in abatement must give the plaintiff a better writ or declaration, the meaning of which is, that, in pleading a mistake of form in abatement of the writ or declaration, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or declaration.

2. SAME—*insanity of plaintiff.* A plea in abatement that, before and at the time of the commencement of the suit, the plaintiff was, and still is, an insane person, etc., is bad on demurrer,

3. INSANE PERSON—*when he may sue.* Until the appointment and qualification of a conservator for an insane person, it is clear that suit may be brought in such insane person's name for the recovery of a debt due him.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. C. D. F. SMITH, for the appellant.

Messrs. CRANE & TATHAM, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Suit was brought by appellee against appellant on a promissory note executed by it to her on the 4th of January, 1875, payable thirty days after date, for $1057.03, with interest thereon at the rate of ten per cent per annum.

Appellant pleaded this plea, verified by affidavit:

"And the said defendant, said Chicago and Pacific Railroad Company, by Chas. D. F. Smith, its attorney, comes and defends the wrong and injury, when, etc., and says that the said plaintiff, before and at the time of the commencement of this suit, was, and still is, an insane person, and as an insane person, then was, and still is, confined in an hospital for the insane, in Batavia, in said State of Illinois, to-wit: at said Cook county. And this, the said defendant is ready to verify; wherefore, it prays judgment of the plaintiff's said writ, and that the same may be quashed."

Appellee demurred, and the court sustained the demurrer and gave judgment for appellee.

The only question is, was the plea good, in law?

The note was due and unpaid, and *somebody* was entitled to sue upon it and enforce its collection. If appellee was not, who was? It is requisite that a plea in abatement shall give the plaintiff a better writ or declaration—the meaning of which, says Stephen, "is, that in pleading a mistake of form, in abatement of the writ or declaration, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection, in framing his new writ or declaration." Stephen on Pleading (Heard's Ed.), 431.

Chitty says: "In the case of a lunatic, the action upon a contract made with *him* should be brought in his name, not in the name of his committee." 1st Plead. (7th Am. Ed.), 20.

By our statute, the conservator of a lunatic shall demand, "sue for and receive in his own name, as conservator, all personal property of and demands due the ward," etc. R. L.

1874, Chap. 86, sec. 11. But until the appointment and qualification of the conservator, it is clear, suit is properly brought in the name of the lunatic.

The judgment is affirmed.

Judgment affirmed.

ROBERT M. MILLER

v.

AMANDA BALTHASSER.

1. INSTRUCTIONS. It is not error to give an instruction involving the issue made by the pleadings. If the cause of action charged in the declaration is not well pleaded, the defendant's proper course is to demur.

2. Where the plaintiff testified that defendant had committed an assault upon her, and the defendant, in his testimony, denied it, and there was no other testimony on the subject, the verdict of the jury necessarily depended upon the degree of credit to be given to one or the other, and it was not error to instruct the jury that if they believed, from the evidence, that the defendant assaulted the plaintiff, as testified to by her, that would warrant them in finding the defendant guilty.

3. SAME—*should require the jury to found their belief on the evidence.* Whilst it would be error to so instruct the jury that they could find a verdict upon their belief, not based upon the evidence, yet it is not necessary to repeat in each clause of an instruction that the jury must believe from the evidence. It is sufficient if, in the first clause of the instruction, they are told that their belief must be founded upon the evidence, and there is nothing in the subsequent part from which sensible men could infer that they had a right to find a verdict upon any belief outside of the evidence.

4. EVIDENCE—*mere preponderance of, is sufficient in a civil suit.* In a civil suit, brought merely to recover damages for a personal injury, a mere preponderance of the evidence is sufficient upon which to base a finding, and it is proper to so instruct the jury.

5. VERDICT—*against the weight of evidence.* A verdict will not be set aside where the evidence is conflicting, even though it may be against the weight of the evidence, unless it is apparent that the jury have been actuated by passion or prejudice.

APPEAL from the Circuit Court of Bureau county; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. ECKLES & KYLE, for the appellant.

Mr. JOHN SCOTT, Mr. J. J. HERRON, and Mr. MILO KENDALL, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of trespass, brought by appellee against appellant, to recover damages for an alleged assault upon her by appellant.

A trial of the cause was had before a jury, which resulted in a judgment in favor of appellee of $1000, to reverse which appellant brings the record here by appeal.

Two grounds are relied upon by the counsel of appellant to secure a reversal of the judgment: *first*, that the court erred in giving appellee's first, fifth and seventh instructions; *second*, that the verdict is contrary to the evidence, and that it was error to overrule the motion of appellant for a new trial.

The questions raised will be considered in the order presented.

The first of appellee's instructions was as follows:

"If the jury believe, from the evidence, that the defendant is guilty of the trespasses, or either of them, as charged in the plaintiff's declaration, then the jury will find for the plaintiff, and assess her damages at a sum not exceeding $5000."

An issue of fact was presented by the pleadings, and it was not improper for the court to give an instruction involving the issue made by the pleadings. *Low* v. *Getty*, 18 Ill. 493.

If the trespass charged in the declaration was not well pleaded, it was the duty of the defendant to have demurred. The issue was, however, properly formed. The instruction was predicated upon that issue, and the evidence offered to sustain it, and, so far as we can perceive, it could not mislead the jury or prejudice the rights of the defendant.

The fifth instruction was in the following language:

"If the jury believe, from the evidence, that the defendant assaulted the plaintiff, as testified to by her, by laying his hands on her, accompanied with the threat that he would kill her, or words, in substance, that if she did not consent to sexual intercourse with defendant, this in itself will warrant the jury in finding the defendant guilty, although the jury may further believe, from the evidence, that she ultimately freely assented to such intercourse. If, however, the jury believe that such ultimate assent was not freely given, but was yielded by the plaintiff only as a consequence of the preceding violence or force, then such sexual intercourse should be regarded by the jury as a part of the assault, and a ground for exemplary damages—that is, such as will compensate the plaintiff for any wrong to her, and to punish the defendant, and to furnish an example to deter others from like practices."

The objection urged to this instruction is, that it ignores all the evidence in the case except that of the plaintiff, and by the last clause of the instruction the belief of the jury was not confined to the evidence before them.

Upon an examination of the evidence introduced upon the trial, it appears that the plaintiff was the only witness who testified to the assault made upon her by the defendant. The defendant, in his evidence, expressly denied the assault. It was, therefore, for the jury to determine which of the two witnesses told the truth.

The verdict necessarily depended upon the degree of credit given by the jury to one or the other of these witnesses.

If the jury believed the testimony of the plaintiff, the verdict would necessarily be for her. If, on the other hand, the jury believed the evidence of the defendant, they could not do otherwise than find in his favor.

Under such circumstances, we can not regard the instruction as improper.

As to the second objection to the instruction, while the jury have no right to form a belief other than from the evidence, and while it would be error for the court to instruct them in such a manner that their verdict could be based upon a belief not founded upon the evidence introduced on the trial, yet it has never been held to be necessary to repeat in each clause of an instruction that the jury must believe from the evidence.

The first clause of the instruction expressly informs the jury that their belief must be formed from the evidence, and, while the same is not repeated in the latter clause, a jury composed of sensible men could not infer that they had the right to travel outside of the record in search of proof upon which to form a verdict.

The seventh instruction, to which objection is made, is—

"7th. In this action the plaintiff is only required to make out her case by a mere preponderance of evidence, to entitle her to recover; and any of the evidence, either circumstantial or positive, which induces belief, is proper to be considered by the jury in determining whether or not the defendant is guilty."

It is said, where the offense charged is of so grave a character, more than a bare preponderance of the evidence should be required to warrant a verdict. This is not, however, a criminal or penal action, but is merely a civil action, brought to recover damages for a personal injury. The judgment involves neither the life nor liberty of the defendant, and we are aware of no authority that would require the plaintiff to establish her cause of action by more than a preponderance of the evidence. The rule that obtains in criminal cases has no application to this.

The last point relied upon by appellant, that the court erred in refusing a new trial, involves a consideration of the evidence introduced before the jury. We shall not, however, enter upon a discussion of the testimony. The principle that must

govern this question has been so long and so well settled in this court that the citation of authorities to support it seems unnecessary. The rule is uniform that a verdict will not be set aside where the evidence is conflicting, even though it may be against the weight of evidence, unless it is apparent the jury have been actuated by passion or prejudice.

If the evidence of appellee be true, appellant, when appellee was a member of his family, in the discharge of her duties as a maid servant, and entitled to his protection, unlawfully assaulted her, and, by means of threats and personal violence, compelled her to submit to sexual intercourse with him.

True, this is all met by an express denial by appellant, in his evidence before the jury, but this conflict on the vital point in the case the law has intrusted to a jury to reconcile and settle; and when they have discharged that duty without passion or prejudice, it is no part of the duty of an appellate court to interfere.

It is urged, that appellee remained at appellant's house two weeks after the assault, and made no complaint in regard to the injury received for near six months, and that this and kindred facts should discredit her evidence. These considerations were, however, before the jury, and were more appropriately addressed to their consideration, bearing upon the question of the weight to be given to appellee's evidence, than to an appellate court.

So far as we can discover from the record, the defendant has had a fair trial on the merits. The law involved in the case was properly given to the jury, and they have found against him upon the facts, and we can not interfere without invading the province of the jury.

The judgment will therefore be affirmed.

Judgment affirmed.

JOSEPH NOWAK

v.

EXCELSIOR STONE COMPANY.

1. BILL OF EXCHANGE—*acceptor can not plead that there was no consideration.* In a suit against the acceptor of a bill of exchange, he will not be permitted to insist that there was no consideration for the acceptance.

2. The fact that the acceptor of a bill of exchange had no funds in his hands belonging to the drawer at the date of the acceptance, or that he was not then and did not thereafter become indebted to the drawer in any manner, makes no difference in a suit against the acceptor, and a demurrer to a plea setting up such fact should be sustained.

3. SAME—*rule as to, under commercial usages, not changed by the statute.* The 9th section of chapter 98 of Revised Statutes of 1874, being substantially like the statute of 1845, in which the word "bill" was held to mean due bill, is to be construed the same way, and held not to have any reference to bills of exchange.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. ADOLPH MOSES, for the plaintiff in error.

Messrs. NORTON, HULBURD & HATCH, for the defendant in error.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The declaration in this case contained a special count upon an order in writing, dated August 12, 187–, drawn by Peter Schmidt on defendant, by the name of "Mr. Nowak," by which Schmidt requested defendant to pay to plaintiff the sum of $227.14, which order, it is averred, was accepted by defendant, in writing, by the hand of his agent, Frank Nowak; also the common counts.

Defendant first filed a demurrer to the special count, and the general issue as to the common counts. The demurrer was overruled. A series of special pleas were then filed by

defendant, the substance of which was, that the writing in the special count mentioned as having been accepted by him, was accepted without any consideration, and that defendant was not indebted to Schmidt or plaintiff, or either of them, and that defendant did not thereafter become indebted to Schmidt in any manner. A demurrer to the special pleas was sustained. Defendant failed to plead further, and plaintiff having entered a *nolle prosequi* as to the common counts of the declaration, judgment was rendered in favor of plaintiff.

The demurrer admits the averments in the declaration, that defendant accepted the order drawn on him, in writing, by the hand of his agent, Frank Nowak, and that, it seems to us, is sufficient. If it were not true, defendant should have put that fact in issue. But this he did not do, and he must be held to be concluded by his pleadings.

The instrument declared on has all the elements of a bill of exchange. It is drawn in the usual way, according to the custom among merchants; is for a specific sum, and is payable absolutely and without conditions. *Leonard* v. *Mason*, 1 Wend. 522.

It was accepted by defendant, in writing, and, under the decisions of this court, he will not be permitted to insist there was no consideration for his acceptance. It makes no difference defendant may have had no funds in his hands, at the date of the acceptance, belonging to the drawer, nor that he was not then and did not thereafter become indebted to the drawer in any manner. The cases in this court are to the point, and are conclusive of this view of the law. *Cronise* v. *Kellogg*, 20 Ill. 11; *Diversy* v. *Moor*, 22 Ill. 330.

The 9th section of chapter 98, R. S. 1874, p. 719, referred to as having changed the rule that obtained under commercial usages, is substantially like the statute of 1845, on the same subject, which was in force when the former decisions were rendered, and it is not understood that section of the statute has any reference to bills of exchange.

In *P. and O. R. R. Co.* v. *Neill*, 16 Ill. 269, it was declared the word "bills," which occurs in the sections subsequent to the first and second sections of the act of 1845, evidently refers to "due bills" in the third section. That case is conclusive as to the construction to be given to this section of the statute.

Manifestly, the recital in the record, that plaintiff entered a *nolle prosequi* as to all the counts of the declaration, was a mere clerical mistake in making up the record. Enough appears from the context to authorize the court to permit an amendment of the record in this particular, which was done at a subsequent term, upon notice to the defendant. We are not inclined to attach any importance to such trivial objections to a record, where the context, as it does in this cause, shows what was really intended. *Hofferbert* v. *Klinkhardt*, 58 Ill. 450.

It is apparent it was intended to enter a *nolle prosequi* to the common counts only, but whatever error intervened in this regard was cured by the subsequent amendment made by the court to the record, upon notice given to the adverse party.

No error appearing that can affect the merits of the case, the judgment will be affirmed.

Judgment affirmed.

BENJAMIN F. SANBORN *et al.*

v.

JAMES A. BENEDICT.

1. CONTRACT—*of sale of grain, to be delivered in future.* A contract between a farmer, engaged in raising corn, and a grain dealer, made whilst corn was growing in the field, whereby the farmer sold to the dealer a certain quantity of corn, at an agreed price, to be delivered when called for, the purchaser to give ten days' notice of the time he would call for it, and a part of the purchase money was paid at the time of making the contract, is an absolute sale of corn, to be delivered in the future, and not a contract for a future sale.

2. And in such a case, the purchaser is bound to give notice of his readiness to receive the corn within a reasonable time; and if he fails to do so, the seller may offer to deliver the corn without such notice, and the purchaser is bound to accept and pay the contract price for it.

3. GAMING CONTRACT—*where property sold is under the control of seller.* If a party has property under his control, he has a right to sell it, to be delivered at a future time, and it is not essential that the party making such sale should have the present possession of the property.

4. A contract, made when corn is growing in the field, for the sale of a certain amount of corn, at a stipulated price, to be delivered in the future, is not illegal, although the judgment of the parties as to the prospect of a corn crop may have controlled them, more or less, in making the contract.

5. TENDER. Where a party has sold and agreed to deliver two thousand bushels of corn, it is a sufficient tender if he has it ready to be delivered, and offers to deliver it, according to his contract, without carrying the whole amount of the corn with him when he makes the offer.

6. MEASURE OF DAMAGES. Where corn is to be delivered upon ten days' notice by the buyer that he is ready to receive it, and the buyer neglects to give such notice in a reasonable time, the seller may offer to deliver the corn without such notice, and demand the contract price, and if the buyer refuses to receive the corn and pay for it, the seller can recover from him the difference between the contract price and the market value of corn at the time of such offer to deliver, at the place where, by the contract, it should be delivered.

APPEAL from the Circuit Court of Winnebago county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. C. M. BRAZEE, for the appellants.

Messrs. WARNER & SUMNER, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

The plaintiff, James A. Benedict, was a farmer, residing near Pecatonica, in Winnebago county, engaged in raising corn. The defendants, Benjamin F. and George W. Sanborn, and Thomas Mahaffey, are grain dealers in Pecatonica, having there a warehouse for the storage of grain. About the middle of June, 1872, the plaintiff and Benjamin F. Sanborn met in the village of Pecatonica, and had a conversation

about corn. Plaintiff said he would sell corn at fifty cents per bushel, and would contract for that. Benjamin Sanborn said he would take it, and notify him when he would call for it; that he would give him ten days' notice. Two thousand bushels was the quantity, and the price fifty cents per bushel. Sanborn then said, "60 pounds." Plaintiff said, "No, 56," meaning the corn should weigh 56 pounds to the bushel. To this, Sanborn assented. Plaintiff then said he wanted a little money on the corn, and Sanborn paid him ten dollars. There was some talk about the prospect for corn that season, plaintiff being confident there was time enough for a good crop, and Sanborn doubtful.

On this contract, plaintiff brought an action of assumpsit, in the Winnebago circuit court, alleging, in the first count of his declaration, that, on the 5th of June, 1872, the defendants bargained for and bought of the plaintiff, and the plaintiff then and there sold to the defendants, two thousand bushels of corn, of 56 pounds to the bushel, at the rate of fifty cents per bushel, to be delivered at Pecatonica by the plaintiff to the defendants within a period of ten days after defendants' request, and to be paid for by the defendants to the plaintiff on the delivery thereof; and, in consideration thereof, and that the plaintiff had then and there promised to deliver the corn to the defendants in the time and at the place aforesaid, the defendants promised the plaintiff to accept the same of and from the plaintiff, and to pay him for the same on the delivery thereof; and, although the plaintiff afterwards, and at divers times after making this contract, to-wit: on the 1st day of June, 1873, at Pecatonica, was ready and willing, and then and there tendered and offered to deliver the corn, and then and there requested the defendants to accept the same and pay him therefor, the defendants would not accept or pay, but wholly refused, etc., by means whereof the defendants became liable to pay the plaintiff one thousand dollars.

The second count is the same as the first, with this exception: To be delivered at Pecatonica by the plaintiff to the

defendants, but at no definite or specified time, by means whereof defendants became liable to accept the corn within a reasonable time thereafter, defendants agreeing to pay for the corn on delivery, in consideration of which, and that plaintiff had then and there promised to deliver the same at the place and in the time, etc., defendants promised to accept the same and pay him therefor; and, although the plaintiff, at divers times thereafter, and on the 1st day of June, 1873, being such reasonable time, at Pecatonica, was ready and willing, and then and there tendered and offered to deliver, and requested defendants to accept the corn and pay for the same, they did not nor would accept and pay for the same, whereby they have become liable to pay plaintiff one thousand dollars.

The third count is the same, with this exception as to delivery: To be delivered at Pecatonica, at any time within ten days after demand by defendants, and to be paid for on delivery, and, by the terms of said contract, no definite and specific time being fixed for the delivery, defendants became legally bound to demand and accept the corn within a reasonable time thereafter, to-wit: within the period of one year from the making of the contract; and in consideration thereof, and that plaintiff had promised to deliver the corn at the place and in the time, etc., the defendants promised to accept and demand the corn, and to pay for the same on its delivery; and, although the plaintiff afterwards, and at divers times after the making of the promise by defendants, and on June 1, 1873, being such reasonable time, and at other times prior thereto, at Pecatonica, was ready and willing, and then and there tendered and offered to deliver the corn to defendants, and requested them to accept and pay for the same, yet the defendants did not, nor would at the said time, etc., accept or demand the corn, but neglected and refused so to do, by means whereof the defendants then and there became liable to pay plaintiff one thousand dollars.

It is unnecessary to notice the fourth and fifth counts, as they were the common counts.

The contract, as above set out, was substantially proved on the trial before a jury, and the court, at the instance of the plaintiff, gave these instructions:

"The court instructs the jury that, when a contract is made, to be performed at a certain place, but at no definite time, the law implies that it is to be performed within a reasonable time.

"That if the jury believe, from the evidence in this case, that the defendants contracted with the plaintiff for the purchase of corn, as in the plaintiff's declaration is alleged and set forth, that it then became, and was, the duty of the defendants, within a reasonable time after the making of such contract, to notify the plaintiff of the time they wanted the corn delivered; but if the defendants did not so notify the plaintiff within such reasonable time, that the said plaintiff, after such reasonable time had elapsed, had a right to demand of the defendants that they receive said corn and pay him therefor; and if the jury believe, from the evidence, that such contract was made on or about the middle of June, 1872, and that, by the terms thereof, no time for the delivery was agreed upon, but that the defendants were to give the plaintiff notice of when the defendants desired it to be delivered, and that the plaintiff was to have ten days after such notice in which to deliver the same; and if the defendants failed to so notify the plaintiff within a reasonable time, and never notified the plaintiff, and if the jury also further believe, from the evidence, that, upon various occasions in the month of May, 1873, the plaintiff was ready, able and willing, and offered to deliver the corn in question to the defendants, and was prevented from delivering the same by the defendants' refusal to receive it, or fix a time when the plaintiff might or should deliver the same, then, in such case, the plaintiff is entitled to recover for such breach of the contract.

"The court instructs the jury that if they believe, from the evidence in this case, that the defendants contracted with the plaintiff for the purchase of corn, as in the plaintiff's declaration alleged, and to be delivered to the defendants upon their giving the plaintiff ten days' notice of the time they, the defendants, desired its delivery, that it became the duty of defendants, within a reasonable time thereafter, to call for the delivery of said corn; and if they further believe, from the evidence, that the defendants at no time prior to the commencement of this suit ever notified the plaintiff of their readiness to receive said corn; and if they further believe, from the evidence, that, upon several occasions in the month of May, 1873, the plaintiff offered to deliver the said corn, and was ready and willing to deliver the same, and was prevented from delivering the same by the refusal of the defendants to permit the plaintiff to so deliver said corn, that such time was a reasonable time for the plaintiff to hold himself in readiness to deliver the corn upon ten days' notice, and that he had a right to demand that the defendants should receive the said corn; and if they further believe, from the evidence, that the plaintiff did, in the month of May, 1873, upon various occasions, request the defendants that they receive the same, and that the plaintiff was ready and willing, and able to deliver said corn; and if they further believe, from the evidence, that the defendants refused to receive the same, and that the defendants have never, prior to the commencement of this suit, notified the plaintiff of their readiness to accept the corn, it is such an unreasonable delay, on the part of said defendants, as to entitle the plaintiff to maintain this suit.

"That if, in this case, the jury find for the plantiff, they will assess the plaintiff's damages at the difference between the contract price of the corn in question and the price and value of corn in Pecatonica, where the corn was to be delivered, at the date of the breach of contract, if the jury believe,

from the evidence, that there has been a breach of said contract."

There was a verdict for the plaintiff, and the damages assessed at two hundred eighty-seven dollars and fifty cents, for which the court rendered a judgment, denying to defendants a new trial. The defendants appeal, and have assigned the usual errors.

The stress of the argument is on the instructions given for the plaintiff, and on the refusal to give those asked by the defendants. A point is made that the verdict is contrary to the evidence, appellant insisting the contract alleged was a transaction for the absolute sale of corn, and not a contract for a future sale, and, as plaintiff had not the two thousand bushels on hand, he perpetrated a fraud upon the defendants, and, therefore, should not recover.

Appellants are right in supposing this was an absolute sale of the corn, but all the testimony shows it was for future delivery, the time thereof to be determined by the defendants. Appellee was bound to deliver after ten days' notice. That it was a sale, is conclusively shown by the fact the purchasers paid ten dollars, at the time of making the contract, "to bind the bargain."

To say a man perpetrates a fraud by contracting to sell that which he has not in present possession, is saying too much, and, if admitted, would put a stop to much of the trade and commerce of the country.

But the fact is, appellee had the control of that quantity of corn at all times after making the contract, as he testifies, and he is not contradicted. Appellants say there was no tender of the corn. It is not a very easy matter for one to carry with him two thousand bushels of corn to tender to his purchaser. It is sufficient if he has the corn ready to be delivered, and offers to deliver it. It is proved, appellee, on several occasions after making the contract, and before June, 1873, had several loads of corn at Pecatonica, and offered

them to defendants on the contract, and they refused to receive them, or any part of them. Had they accepted, it was but a small matter to drive the teams to defendants' warehouse and unload. The corn was then in plaintiff's wagons. There is no ground for saying that plaintiff was not at all times ready and willing, and able, to deliver the corn after ten days' notice. A promise for a promise is a good consideration. *Funk* v. *Hough*, 29 Ill. 145.

Appellants contend the plaintiff could not recover on this contract until the defendants had exercised their option, and made a demand for the corn. They had their "option" when they would demand the corn, and plaintiff had ten days after demand in which to deliver it.

This is so, undoubtedly, though it is not proved anything was said about an "option." The contract was, the corn was to be delivered on ten days' notice, and paid for on delivery. This, like all *bona fide* contracts, has two sides—the vendor on one, the purchaser on the other side. They are equally affected by its terms. Had notice been given and the delivery made by plaintiff, there can be no doubt he would be entitled to the price agreed upon. Had he failed to deliver, he would be liable for all damages. Assuming defendants were to declare their option, there being no fixed time within which it was to be done, the law implies it should be done in a reasonable time. To hold otherwise, would make the contract unilateral—binding the seller, but not the purchaser, as he might never exercise his option. Had the price of corn advanced in the market of Pecatonica, can there be a doubt defendants would have given the notice, and had plaintiff failed to deliver, that he would have been bound to pay the difference? There can be no dispute about this. Then, if corn had declined, and no notice given, had not the plaintiff a right, after waiting a reasonable time for notice, to offer to deliver? We think this is clear, and his damages would be measured by the market price of corn at the same place where offered to be delivered.

This disposes of the objection made by appellants to the admission of testimony, on behalf of plaintiff, showing the price of corn at Pecatonica, in May and June, 1873.

The instructions given for the plaintiff are in harmony with the views herein expressed, and are unexceptionable. As to the instructions asked by the defendants, they being opposed to those given for the plaintiff, were properly refused.

The objection that this was a gaming contract, and should not be enforced, has no force. Plaintiff had under his control, when he made this contract, the quantity of corn defendants bargained for, and he had a right to contract to sell it, to be delivered at a future day.

The contract was made when corn was growing in the field, and the judgment of the parties on the prospect of a crop controlled them, more or less, in making the contract. We can not perceive any illegality in it, and are of opinion, in the verdict and judgment, justice has been done, and the judgment must be affirmed.

Judgment affirmed.

ALFRED BERRINGTON

v.

MICHAEL F. CASEY.

1. LEASE—*implied covenants.* The law will imply covenants for quiet possession and enjoyment against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the lease.

2. SAME—*remedy of tenant for breach of implied covenant for possession by landlord.* Where the landlord leases premises to a tenant by a parol lease, and afterwards, and before the tenant gets possession, leases the same premises to another and puts him in possession, the first tenant may either bring an action of ejectment and recover the possession, or he may sue in assumpsit for the breach of the implied covenant for possession and quiet enjoyment.

3. And in such case the tenant is not required to offer to pay the rent as it would accrue under his lease, after the breach of contract by the landlord, to entitle him to maintain his suit for such breach.

4. EVIDENCE—*when paper may be read to the jury.* Where the execution of the instrument sued on had been proved, and other evidence adduced in relation to it, it was a proper exercise of discretion for the court to permit the counsel for the plaintiff to read it to the jury, for the first time, in his closing argument.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. CHARLES J. BEATTIE, for the plaintiff in error.

Messrs. WOOD & LOOMIS, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an action of assumpsit, brought in the Cook circuit court, by defendant in error against plaintiff in error, to recover damages for breach of a lease of a house and lot, in the city of Chicago. The lease was in writing, and is this:

"CHICAGO, *Dec.* 7, 1871.

Received of M. F. Casey ($10) ten dollars on rent of store, on corner of Lake (No. 22) and Canal streets, which Mr. Casey is to have for $100 per month, till May, 1873.

ALFRED BERRINGTON."

A trial was had, by the court and a jury, resulting in a verdict in favor of plaintiff for $450. And, after overruling a motion for a new trial, the court below rendered judgment on the verdict, and defendant prosecutes this writ of error, and asks a reversal of the judgment.

It appears from the record that plaintiff in error executed the instrument declared on, at the time it bears date, and received the $10 as an advance payment on the rent. But some eight or ten days afterwards, he leased the premises to one McLaughlin, for $125 per month, and put him in possession of the premises. Plaintiff in error was in possession when the lease was made, and so continued until he let Mc-

Laughlin in under the lease to him. Defendant in error, on his return from New York, saw plaintiff in error and offered to pay him the balance of the first month's rent, and demanded possession, but plaintiff in error refused to receive the money or to deliver possession, and offered to refund the $10 received under the lease, but defendant refused to receive it and thereupon brought this suit.

It is contended by plaintiff in error that this is a lease and not an agreement for a lease. In this, we are inclined to agree with him, but it does not matter, as defendant in error inserted two special counts in his declaration, one on the writing as a lease, and the other as an agreement for a lease. So, whether it be the one or the other, can not matter, as, if the evidence warrants it, he had a right to recover under either.

It is said that defendant in error declared on a parol contract, when it is in writing. All works on evidence, it is believed, describe writings not under seal, as parol, and writings under seal, as deeds, or writings obligatory. This is a rule familiar to the profession. And we deem it unnecessary to consume time in referring to or discussing this supposed objection.

It is objected that the instrument declared on contains no covenant for possession or quiet enjoyment by the lessee, even against the lessor. In *Wade* v. *Halligan*, 16 Ill. 507, it was distinctly announced as a rule of law, that the law will imply covenants for quiet possession and enjoyment against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the lease. And that decision is based on well recognized principles, and fully sustained by undoubted authority.

This, then, being a lease, and there being an implied covenant for possession and quiet enjoyment attaching to or growing out of it, and plaintiff in error having broken the covenant by leasing to and letting McLaughlin into possession, in exclusion of defendant in error, what is his remedy? May he sue and recover on this breach of cove-

nant, or shall he bring his ejectment? We apprehend that he has his election of actions. He may undoubtedly sue for a breach of the implied contract for possession and quiet enjoyment, in assumpsit, as the instrument is not under seal.

This is settled by the case of *Green* v. *Williams*, 45 Ill. 206. The rule is reasonable and promotive of justice. And it has been fully recognized and adhered to in the case of *Gazollo* v. *Chambers*, Sept. T. 1874. There was, then, no error in bringing assumpsit for the breach of contract by plaintiff in error.

It is urged that defendant in error should not have been permitted to recover until he paid or tendered the first month's rent. He did offer to pay, but plaintiff in error refused to receive it. We can scarcely open a volume of reports without finding cases holding that where a party refuses to receive money, such action dispenses with a formal tender. If anything is well and uniformly settled, that rule is. Again, he had placed it out of his power to perform on his part, and it would be a positive injustice for the law to require defendant to go on and pay the monthly installments to the end of the term, and he out of possession, without the power to get in within the term. And, if the first installment should be paid, under the same rule, and for the same reason, the other installments should be paid. To so hold, would not only be useless, but unjust, and the law can never require such acts.

It is claimed that the court below erred in permitting the counsel for the defendant in error to read the receipt to the jury, for the first time, in his closing argument. Its execution had been proved, and other evidence had been introduced in reference to it in the progress of the trial. Hence there was no surprise on the other party. It is not as if, at the close of the argument, he had called a witness and proved its execution, and then offered it in evidence to the jury, and that would have been discretionary with the court, under proper restrictions, that would have protected the other party from surprise and wrong. We do not sit here to seize

upon such mere formal objections to reverse judgments that fully accord with justice, and give to men their undoubted rights. To do so, would pervert the very object and purpose of establishing tribunals of justice, and operate to perpetuate wrong instead of protecting the right. This action of the court was in the proper exercise of discretion, and could have worked no possible wrong to plaintiff in error.

The damages were not excessive, but, on the contrary, the evidence would have warranted the finding of nearly double the amount.

The judgment of the court below is affirmed.

Judgment affirmed.

HENRY B. PETERS *et al.*

v.

ALEXANDER ELLIOTT *et al.*

1. CONSIGNEE—*rights of, to goods consigned, as against creditors of consignor.* Where a party consigns goods to another, and draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading or shipping receipt as collateral security for its payment, the acceptance and payment by the consignee of the draft, accompanied with the bill of lading or shipping receipt, vests in him a special property in the goods sufficient to maintain replevin against an officer who, after such delivery, attaches them upon a writ against the general owner.

2. In such case, although the draft is not paid until after the officer has levied on the goods, still, if the draft and shipping receipt were delivered to the payee of the draft before the levy, such delivery will be regarded as made for the use of the consignee, and when he pays the draft, his right to the goods will relate back to the time of the delivery of the draft and shipping receipt to the payee of the draft, and this without reference to whether the payee of the draft paid any consideration therefor to the owner or not, if the consignee paid it in good faith, without notice of any attachment or levy on the goods.

APPEAL from the Circuit Court of Mercer county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

Statement of the case.

This was a suit in replevin, brought by Peters, Fuhlhage & Co., to recover the possession of 200 barrels of flour.

The flour had been levied upon and taken out of the hands of the Chicago, Burlington and Quincy Railroad Company by a constable, as the property of Cannon & Van Liew, under four several writs of attachment issued against them. The defendants in the suit are, the constable, in whose possession under the levy the flour was, and the plaintiffs in the attachment suits. The controversy was as to the property in the flour at the time of the levy of the writs of attachment, whether it was in Cannon & Van Liew, or in the plaintiffs in this suit, Peters, Fuhlhage & Co.

The evidence consisted of a shipping receipt, a draft, and a written stipulation of facts, as follows:

"*Chicago, Burlington and Quincy Railroad Line.*

No. 236. VIOLA, ILL., *April* 30, 1874.

Received from Cannon & Van Liew, as consignors, the articles marked and weighed, as follows:

ARTICLES.	MARKS AND NUMBERS.	WEIGHT.
200 bbls. Flour, Shipped in cars, (More or less).	No.'s 716 and 810.	

To be billed to

PETERS, FUHLHAGE & Co.,

(Original.) East St. Louis, Ill.

* * *

This receipt is not transferable.

A. O. WATERMAN,

(1033.) Freight Agent."

"$1000. ALEDO, ILL., *April* 30*th*, 1874.

At sight, pay to the order of McKinney, Gilmore & Co., one thousand dollars, and charge the same to account of

CANNON & VAN LIEW.

To Peters, Fuhlhage & Co.,

St. Louis, Mo.

INDORSEMENT.

Pay *Valley Nat. Bank*,

St. Louis, Mo.

McKINNEY, GILMORE & Co.

E. E. MOSES, Teller."

Stipulation as follows:

"It is admitted by the defendants that the plaintiffs paid to the Valley National Bank of St. Louis, Mo., $1000, on the 2d day of May, A. D. 1874, on the above draft, and that to said draft was attached the said shipping receipt signed by the agent of the Chicago, Burlington and Quincy Railroad Company, at Viola, Ill.

"It is further admitted, that the said draft was mailed to the said Valley National Bank of Missouri, on the 30th day April, A. D. 1874, by McKinney, Gilmore & Co., and reached said bank with the shipping receipt attached in the ordinary way, and that said plaintiffs paid said draft in good faith, and had not, at the time they paid the same, any knowledge of the existence of any attachment suit, or of any levy on said flour, by virtue of any process of law.

"It is further stipulated, that Cannon & Van Liew had not, at the time of the shipment of said flour to the plaintiffs, nor at the time it was levied on by said attachments, sold or contracted to sell said flour to said plaintiffs, but that said flour was simply consigned to said plaintiffs, as commission merchants, to sell and account for the proceeds to said Cannon & Van Liew.

"It is further stipulated, that said draft was drawn on the morning of April 30th, 1874, and delivered to McKinney, Gilmore & Co. before 12 o'clock in the forenoon of said day, with said shipping receipt for the flour in controversy, by Cannon & Van Liew, who then said: 'You hold said flour for your security.' That McKinney, Gilmore & Co. held a note against said Cannon & Van Liew for $600, which the said draft and receipt were to secure, and which was afterwards, when the $1000 were collected, surrendered to said

Cannon & Van Liew, with the remainder of $400 placed to their credit, and paid out on their order.

"It is further admitted, that the said McKinney, Gilmore & Co. placed said draft and shipping receipt in the postoffice in Aledo, by 3 o'clock in the afternoon of said day, directed to the National Valley Bank of St. Louis, for collection.

"It is further admitted, that the several attachment suits offered in evidence by the defendants were not commenced until 2 o'clock in the afternoon of the said day, and the property was not levied upon until after that time."

It was admitted that the four writs of attachment in favor of the defendants, against Cannon & Van Liew, were issued and levied upon the flour on the 30th day of April, 1874, and that judgments were rendered afterward in the suits, against Cannon & Van Liew, in favor of the several plaintiffs.

Messrs. BASSETT & WHARTON, for the appellants.

Messrs. PEPPER & WILSON, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is admitted by the counsel for the appellees, that, ordinarily, a sale, mortgage or pledge of property in the course of transportation, may be legally made, and the title passed by the delivery of the shipping bill. But it is contended that the rule, being received in its full force, does not, under the circumstances of this case, aid the claim of right to this property which is here asserted on the part of the plaintiffs.

It is first claimed that no right to the flour could pass by the delivery of the shipping receipt, because of the provision in it, that it was not transferable.

It is enough to say, that, whatever the reason of this provision, it must have been, for some purpose, in the interest of the railroad company. As the company intended and undertook to carry and deliver the flour to the consignees, the delivery of the shipping receipt to them, or for their benefit,

was only to the strengthening of their right to have the delivery of the flour made to them, and it is not perceived how plaintiffs', the consignees, assertion of right to the property, through a delivery of the receipt, should interfere with any interest of the railroad company, or any object of this provision in the shipping receipt. We do not conceive that it has any significance in its bearing upon the rights of the parties in this suit.

It is then objected that there was no valid sale or pledge to McKinney, Gilmore & Co., or to the plaintiffs, of the flour prior to the levy of the attachments, because the former parted with nothing for the draft; that they neither surrendered up the note for $600, upon which the drawers were indebted to them, nor paid to the drawers the excess of $400 above the note, until after the draft was collected and the money remitted to them from St. Louis; that they merely forwarded the draft for collection; that it was a voluntary pledge to them. The pledge of the property by delivery of the shipping receipt, if made to secure a pre-existing debt, would be as valid as if made for new advances.

There was an acknowledged indebtedness of $600 to McKinney, Gilmore & Co., which the draft and shipping receipt were to secure. This would form a sufficient consideration for a pledge of the property to them, if it were to be regarded as one to them alone.

The excess of the amount of the draft which they received above their indebtedness, the $400, might have been garnisheed in the hands of McKinney, Gilmore & Co. by these attaching creditors, but the latter could not take the flour from the former. By the delivery of the draft and shipping receipt to McKinney, Gilmore & Co., Cannon & Van Liew were divested of the title to the flour, so far as was necessary to protect the payment of the draft; their interest then was in the surplus only, and their attaching creditors acquired no greater interest than they possessed. *Schweizer* v. *Tracy*, 76 Ill. 345.

But it is insisted that, whatever the rights of McKinney, Gilmore & Co. may have been, as the plaintiffs did not pay the draft until some days after the levy of the attachments, they could have acquired no right to the property until at that time, and that it must have been acquired from McKinney, Gilmore & Co; but that the latter, at that time, could not transfer any right to the property, because it was in the adverse possession of the officer, under the attachments; that their claim to the property was then but a right of action for the property, which, under the law, can not be sold or assigned, and various authorities are cited to that point.

We do not consider that the state of facts in this case brings the claim of the plaintiffs within the range of the objection taken, or of the authorities cited.

The simultaneous acts, of the shipment of the flour, drawing the draft and the delivery of the same, together with the railroad receipt for the flour to the payees of the draft, McKinney, Gilmore & Co., expressed the intention of the drawers, that the drawees should pay the amount of the draft and reimburse themselves for the payment, out of the flour. It was a request to the drawees, these plaintiffs, to pay the draft, and an intended transfer of the flour as a security to protect them in the acceptance and payment of the draft. At the time, Cannon & Van Liew were the absolute owners of the flour, and had the full power of disposition of it. Their intention and purpose should have effect, unless there be some rule of law which forbids. There is none such, but, on the contrary, the law sustains and gives effect to transactions of this character.

It is well settled, that, where a party consigns goods to another, and thereupon draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading, or shipping receipt, as collateral security for its payment, the acceptance and payment, by the consignee, of the draft accompanied with the bill of lading or shipping receipt, vests in him a special property in the goods, sufficient to maintain

replevin against an officer who, after such delivery, attaches them upon a writ against the general owner.

The bill of lading, or shipping receipt, in such case, is a symbol of the goods, and the delivery thereof, with the intention to transfer the property in the goods, is a symbolical delivery of the goods. *Michigan Central Railroad Company* v. *Phillips et al.* 60 Ill. 190; *Haille* v. *Smith*, 1 Bos. & Pull. 563; *Holbrook* v. *Wight*, 24 Wend. 169; *Grosvenor* v. *Phillips*, 2 Hill, 147; *The Bank of Rochester* v. *Jones*, 4 Comst. 497; *Gibson* v. *Stevens*, 8 How. 384; *Allen* v. *Williams*, 12 Pick. 297; *National Bank of Cairo* v. *Crocker*, 111 Mass. 163; *First National Bank* v. *Dearborn*, 115 id. 219.

The delivery of the shipping receipt took place before the levy of the attachments, but, as payment was not made of the draft until some days after such levy, it is supposed by appellants' counsel that the plaintiffs' title had its origin at the time of such payment, and so must yield to the prior levy of the attachments. But the interest acquired by the plaintiffs in the flour dates back to the time of the delivery of the draft and shipping receipt to McKinney, Gilmore & Co. The delivery to the latter is to be regarded as one made to them for the use of the plaintiffs, vesting the property in the latter provisionally,—that is, in case of their acceptance and payment of the draft. The plaintiffs, from the time of that delivery, had a *lien* upon the flour for the advance they should make, with possession in themselves, for the constructive possession of McKinney, Gilmore & Co. is to be regarded as theirs. And, as respects the right of the plaintiffs, we do not conceive it makes any difference that McKinney, Gilmore & Co. paid nothing for the draft; that they received it to pay a debt of $600 to themselves, and to pay over the balance of $400 to Cannon & Van Liew; or whether there was any consideration whatever between Cannon & Van Liew and the payees of the draft.

The draft came to the plaintiffs with the shipping receipt attached to it. They paid it in entire good faith, with no

notice of the attachments or their levy. They were entitled to make the payment on the credit of the flour, and to hold the flour which the shipping receipt represented, for their security in making the payment. It would be, in effect, as if, at the time of making the draft, a mortgage of the flour had been given to the drawees to secure them in the payment they should make of the draft. A mortgage may be made to secure future advances, and will be effective to that end, at least when the future advances are made in good faith, without notice of any intervening adverse right.

Our conclusion, then, is, that the plaintiffs had at least the interest of a *lien* upon this flour to secure the advance they made upon the draft, which is to be regarded as acquired at the time of the delivery of the draft and shipping receipt to McKinney, Gilmore & Co.; and that these attaching creditors had no right afterward to levy upon and take the property out of the hands of McKinney, Gilmore & Co., in whose constructive possession it was for the plaintiffs, before their claim upon the property was discharged.

The judgment must be reversed.

Judgment reversed.

FREDERICK A. BRAGG

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

JURY—*right to perpetual exemption from serving.* The legislature has not the power to exempt a person perpetually from serving on juries, in consideration of services rendered as a member of a fire company; but such exemptions are subject to repeal by any succeeding legislature.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

This was a proceeding against Frederick A. Bragg, for a contempt of court, for not serving as a juror. The defendant gave in evidence certain parts of the charter of the city of Chicago, exempting persons who should have served as firemen in the city seven years, from serving on all juries. The sections referred to are in Laws 1836–7, sec. 54, p. 72, Laws of 1854, p. 163, chap. 9. sec. 6, and Laws of 1854, p. 217, sec. 4. The defendant also proved, that he had served as fireman in the city for seven years. The court imposed a fine of $20, and the defendant appealed.

Messrs. HOLDEN & MOORE, for the appellant.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant claims that he is exempt, perpetually, from serving on juries, by virtue of a contract with the State, granting him such exemption in consideration of services rendered as a member of the fire department of the city of Chicago, notwithstanding any provisions that may be in the statute now in force in relation to juries to the contrary.

The same question was presented in *Scranton* v. *The People*, Sept. T. 1874, and we held the claim inadmissible. We then stated, the supposed exemption could not be the subject of a contract, and was a mere gratuity, which the law-making power might withdraw in its pleasure, but did not state the reasons for this conclusion. To remove an erroneous impression into which the counsel for appellant seem to have fallen in this respect, we shall here state, briefly, why, in our opinion, the State can not, by contract, perpetually exempt persons from serving on juries.

The constitution of 1848, like the present constitution, contains these guarantees to all citizens: That the right of trial by jury shall remain inviolate; that no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury, (with certain exceptions

immaterial to the present question); and that in all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury of the county or district wherein the offense was committed.

It is, therefore, impossible for the State to protect life, liberty and property without the aid of juries. The system is a vital part of the machinery of government. It is the undoubted duty of the legislative department to provide for the selection of jurors, in such way as shall best subserve the public welfare. Of this, of course, it must necessarily be the judge, and may provide that, for the time being, certain classes, by reason of what shall be deemed sufficient public considerations, shall be exempt; but to say that such exemptions shall be perpetual, whatever may be the public necessities, would be to authorize one legislature, by unwise legislation, to tie the hands of its successors, even to the extent of destroying the government.

The question is simply one of power in the legislature. It is not and can not be pretended there is any principle upon which it can be held the claimed perpetual exemption, on account of service in the Chicago fire department, can be maintained, which would not equally apply to exemptions on account of any other services to be rendered for the assumed benefit of the public.

It is within possibility, therefore, that one legislature (conceding the power to exist) might, by exemptions, render it impossible to obtain a jury from the better class of community, however wise and efficient a system for that purpose might be adopted by its successor. Moreover, if one citizen may be allowed to purchase exemption, it may be allowed that all citizens shall do so, and thus not only partially but entirely defeat the guarantees of the constitution.

All citizens owe the duty of serving on juries, when properly selected under laws made for that purpose, for precisely the same reason they owe the duty of bearing arms in defense of the government, when its existence is menaced by violence.

It is necessary to its existence, and to their protection in the enjoyment of the rights secured by government. If these duties may be the subject of purchase from the government, and thereafter withheld, however urgent the necessity for their exercise, then why may not a legislature make every function of government the subject of sale? It can be no answer to say, no legislature would ever exercise the power to the extreme limits here supposed, for the probability that a claimed power will not be abused is no proof of its possession.

The power claimed is, in effect, to tie the hands of future legislatures, in providing for the selection of an instrumentality, through which, under the constitution, the most important laws can alone be enforced; and whether this shall be as to ten citizens, or all the citizens in a county, is only a question of degree. So long as the jury system shall be maintained, it can admit of no controversy, it is the interest of all that the legislature shall be at liberty to perfect it from time to time, as experience shall justify, to the end that honesty and efficiency shall be brought into the jury box. And it is not, in our opinion, competent, that a legislature shall bind the State perpetually that this man or that class of men, being honest and capable, shall not be required to act as jurors.

We are reminded, however, that it has been held that the State may bind itself not to exact taxation in regard to particular property; and it is argued the same principle would apply here. It is sufficient to say, in regard to those cases, if they can be justified on principle, it must be admitted they push it to the extreme verge, and it will bear no extension. But they rest upon the assumed hypothesis, that the State has received an equivalent in kind—that is, something which produces to the State revenue an amount equal to that which is surrendered. There is nothing of that kind here. The services performed in the fire department can, by no fiction, be made to take the place of the man in the jury box. Under

the hypothesis in those cases, the revenue is kept up, so that if the purchased exemptions were universal, there would be an amount received sufficient to obviate any necessity of future taxation, whereas here, if the purchased exemptions were to become universal, there would be no jury, and nothing can be substituted for it.

The judgment is affirmed.

Judgment affirmed.

ELI TUTTLE *et al.*

v.

WILLIAM ROBINSON.

1. REPLEVIN—*when demand necessary.* Where property, in the possession of the agent of the owner, is levied on by an officer under an execution against a third party, and then turned over by the officer to such agent, to hold as his custodian, it is not necessary for the owner to make a demand before bringing repievin against such officer and custodian.

2. Where an officer levies an execution on property in the possession of the defendant in the execution, as his property, he only discharges his duty, and his possession is lawful, and if another party claims the goods, he must make a demand before he can maintain replevin for them; but if the goods are in the possession of the party so claiming them when levied on, then no demand is necessary.

3. PERSONAL PROPERTY—*transfer of, valid as between the parties, without change of possession.* Where personal property is turned over by a debtor to his creditor, to secure his indebtedness, the arrangement is binding between the parties, although not followed by such a change of possession as would be binding upon other creditors of such debtor.

4. Where the owner of personal property turned the same over to a creditor to secure an honest debt, and the possession was delivered to the creditor, and afterwards the attorney of such debtor, under a power of attorney, which only authorized the sale of real estate, sold such property to the creditor in discharge of the debt, it was *held*, that, even if the power of attorney did not authorize such sale, yet, as the debt was not paid in any other way than by such sale, the creditor would still have the claim

on the property under the original arrangement, and could hold the same against creditors or other persons.

6. ERROR *will not always reverse.* Where an instruction is given upon a point that does not properly arise in the case, and it is not calculated to mislead the jury, or to prejudice them against the opposite party, the judgment will not be reversed, even though the instruction may have been improperly given.

APPEAL from the Circuit Court of Peoria county; the Hon. JOSEPH W. COCHRAN, Judge, presiding.

Mr. H. B. HOPKINS, Mr. J. HOUGH, and Mr. N. MATTHEWS, for the appellants.

Messrs. JOHNSON & HEWETT, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of replevin, brought by William Robinson, in the circuit court of Peoria county, against Eli Tuttle and Claiborn Haralson, to recover certain personal property which had been levied upon by Tuttle, a constable, under a writ of attachment issued by a justice of the peace, in favor of Haralson, against one Sydney Ames.

The defendants to the action pleaded property in Ames, and justified the taking under the writ of attachment. Upon this issue a trial was had, which resulted in a verdict in favor of the plaintiff. The court overruled a motion for a new trial and rendered judgment upon the verdict, to reverse which the defendants have brought this appeal.

It is claimed by appellants that no demand for the property was made before the commencement of the action; that the possession of Haralson was lawful, and as to him the judgment is erroneous.

Haralson was occupying a farm that belonged to appellee, under a lease. The property in question was on the farm in the possession of Haralson, under an arrangement between him and appellee. After the levy by the constable, the property was turned over by the officer to Haralson for safe keep-

ing. He then held the possession, not under and for appellee, but under the officer. The acts done by the constable under the writ changed the possession and custody of the property from appellee to himself.

As Haralson, after the levy, held the custody of the property for and under the constable, it necessarily follows that, if the possession of the property taken by the officer was unlawful, Hartman, who stood in the officer's shoes, occupied a like position.

It can not be said, neither is it claimed, that the constable came into the possession of the property lawfully as against Robinson. The writ under which the levy was made was against Ames. Had the constable found the property in the possession of Ames, and levied upon it as his property, under the writ, he would have only discharged a duty imposed upon him by law, and his possession could not have been regarded otherwise than lawful; but when he took the property from the possession of Robinson under a writ against Ames, it is obvious a different rule prevails.

The possession of the property, therefore, having been acquired unlawfully, no demand was required before the action was brought, and it was not necessary to prove a demand to sustain a recovery. *Clark* v. *Lewis*, 35 Ill. 417.

The second position taken by appellants is, that the evidence shows appellee had no title to the property.

It is unnecessary to enter upon an examination of the testimony in regard to the manner in which Robinson acquired the farm which formerly belonged to Ames, or the motives that actuated either party in regard to that transaction, as it has no direct bearing upon the question involved.

It is clear, from the evidence, that, in the spring of 1869, Ames was indebted to Robinson in the sum of $700, and, in order to secure the payment of this indebtedness, he turned over to Robinson the property in controversy, together with other property, all of which was then upon a farm the title to which was in Robinson, but which had formerly belonged to

Ames, the latter, at the time, being in the possession of the farm by the consent of Robinson.

At the time of this transaction, it does not appear, from the evidence, that Ames was involved or indebted to any person except Robinson; and even if it be true that, at the time this transfer was made, it was not followed by such a change of possession as would be binding upon creditors, yet the transfer was legitimate and binding between the parties themselves.

The property remained upon the farm, under the supervision of Ames, until the spring of 1872, when a large portion of it was sold by Robinson, and he retained the proceeds. The balance of the property remained upon the farm. In the spring of 1872 the farm was leased by Robinson to appellant Haralson, and, in the month of May of that year, Ames on account of some violation of the law, left the country.

The property in controversy remained upon the farm until it was levied upon under the writ of attachment sued out by Haralson in December, 1873. In the meantime, on the 22d day of April, 1873, it appears, from the evidence, that a settlement was made between Robinson and one Maxson, who was acting under a power of attorney for Ames. In the settlement, a portion of the farm was transferred to Ames, and, as shown by the evidence of both appellee and Maxson, Robinson was to have all the personal property on the farm.

It is, however, said the power of attorney under which Maxson acted did not authorize him to sell personal property, but only to collect all debts due Ames, and sell real estate.

If it be true, that the attorney did not strictly have the power of sale, yet, as the debt for which the property was originally turned over to appellee was not paid in any other manner except by that sale, if the sale was not authorized, appellee would still hold the claim upon the property acquired under the original arrangement entered into between him and Ames.

The vital question in the case, as we understand it, then

is, whether there was a change of the possession of the property, from Ames to Robinson, prior to the time it was attached by appellant.

If Ames transferred the property to Robinson to secure an honest debt, and this was followed by a change of the possession of the property to Robinson, there can be no doubt but Robinson would be entitled to hold the property against creditors or other persons; but if, on the other hand, the property remained in the possession of Ames until it was attached, then it would be subject to the writ.

Whether there was a change of possession, was purely a question of fact for the determination of the jury, and if the record contains evidence upon which the jury could reasonably predicate a verdict, we can not interfere, although we might be inclined to the belief that the weight of the evidence preponderated against the verdict.

While it is true, from 1869 to the spring of 1872, the property was in the charge of Ames, whether he was employed by Robinson, or in what capacity he acted, the record does not disclose. During this time, however, Robinson exercised acts of ownership over the property. It was assessed to him. He made sales of a portion of the property, and received the proceeds. He owned the land upon which it was kept, and in various ways exercised acts of ownership over it.

After Ames left, in the spring of 1872, appellee removed a portion of the property to his own residence, and, if his evidence is to be credited, and we see no reason to discredit his statements, the remaining portion of the property was left with appellant, who was the tenant of appellee under a contract by which appellant was to take care of the property for appellee for the privilege given appellant of using the milk of the cows.

From these facts, the jury could not consistently do otherwise than find that appellee was in the possession of the property.

Appellee was not bound, in order to hold the property, to

take the actual custody of it himself, but he might properly leave it upon land he owned, and employ others to care for and look after it for him.

The last point relied upon by appellants questions the second instruction given for appellee. We do not deem it important to stop to consider whether the law was correctly stated in the instruction, or not. It was upon a point that did not properly arise in the case, and the instruction was not of a character calculated to mislead the jury or to prejudice them against appellant. As the instruction, therefore, could do no harm, even though it may have been improperly given, we can not, on that account, reverse.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

WILLIAM E. FURNESS *et al.*

v.

ELIZABETH MCGOVERN *et al.*

1. MARRIED WOMEN—*remedy against them on contracts.* The liability of a married woman for services rendered at her request, in relation to her separate property, is at law, and not in equity.

2. SAME—*charge on their separate property.* There must be a positive intention manifested by some appropriate instrument in writing, or otherwise, to make the debt or claim a specific charge upon the separate property of a married woman, before equity will assume jurisdiction to enforce it.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. WILLIAM A. PORTER, Judge, presiding.

Mr. CHAS. E. POPE, for the plaintiffs in error.

Messrs. FORESTER, BEEM & GIBBS, for the defendants in error.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

Complainants allege they were employed by defendant, Elizabeth McGovern, to negotiate for her a loan of money, to be secured on her separate property; that they did effect such loan, but that she declined to receive the money and secure it upon her property, according to their agreement with her; and that they are entitled, under their contract, to commissions for procuring the loan on her behalf, which they seek, by this bill, to enforce against and have declared a lien upon her separate property.

Conceding the contract was made as alleged, and that there has been a breach, complainants can obtain no relief in equity. The defendant is a married woman, and the contract insisted upon, if made at all, was made with her in relation to her separate property, and the liability, if any, is at law and not in equity. *Cookson* v. *Toole*, 59 Ill. 515; *Halley* v. *Ball*, 66 Ill. 250; *Parent* v. *Callerand*, 64 Ill. 97.

A general engagement or simple contract will create no such charge upon the separate property of a married woman, as can be enforced in a court of equity. There must be a positive intention manifested by some appropriate instrument in writing, or otherwise, to make a debt or claim a specific charge upon her estate, before equity will assume jurisdiction. That has not been done in this case. Whatever remedy the parties may have had, is at law. *Williams* v. *Hugunin*, 69 Ill. 214.

But another view may be taken, that is conclusive of the present case. All the allegations of the bill are distinctly and positively denied in the answer, and they are not sustained by any proof in the record.

The bill was therefore properly dismissed, and the decree must be affirmed.

Decree affirmed.

A. GREEN COURSEN

v.

JOSEPH F. HIXON.

1. RECITAL *of service.* Where a judgment recites due service of process on the defendant ten days before the first day of the term, and there is nothing in the record to impeach or contradict the recital, there is no want of jurisdiction, and the judgment is regular.

2. SCIRE FACIAS—*to make a defendant a party to a judgment, is nothing more than a summons.* The Practice Act of 1874 provides, that where judgment has been rendered against one of several joint defendants, a summons, in the nature of a *scire facias*, etc., may issue. This writ is a summons, and nothing more.

3. SERVICE *by special deputy.* It is no objection to the service of a *scire facias* that it was made by a special deputy, who had not taken an official oath. The statute requires a return made by a special deputy to be verified by his affidavit, and this is the only oath he is required to take.

4. SETTING ASIDE JUDGMENT *at subsequent term.* A motion to set aside a judgment can not be made after the term at which it was rendered.

5. The statute giving to a motion the same efficacy as a writ of error *coram nobis*, does not affect this rule, the only object of that statute being to dispense with this old writ.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. A. GARRISON, for the plaintiff in error.

Mr. D. E. K. STEWART, and Mr. WILLIAM L. MOSS, Jr., for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a motion, in the Superior Court of Cook county, by the plaintiff in error, to set aside a judgment rendered by default against himself and one John B. Young, and in favor of Hixon and Rodbourn, plaintiffs.

It appears, plaintiff in error was jointly sued in the action with John B. Young, and at the March term, 1874, a default

was taken against him, and judgment rendered against him for damages, the judgment entry reciting that process was personally served upon him.

Afterwards, on the 13th of March, 1874, a *scire facias* was issued, to make plaintiff in error a party to the judgment, which was returned without any indorsement thereon.

On the 16th of June, thereafter, an alias *sci. fa.* was issued for the purpose, in the usual form, returnable on the first Monday of July term. On the back of this writ is found this: "I hereby appoint and deputize William E. Cook a special deputy sheriff, to serve the within writ. Dated 26th June, 1874. T. M. Bradley, sheriff."

On this writ is this return, verified by the affidavit of William E. Cook: "Served the within writ of *scire facias* on the within named defendant, A. G. Coursen, by reading the same to him, on the 26th day of June, A. D. 1874. T. M. Bradley, *sheriff*, per William E. Cook, *special* deputy."

On July 10th, at the July term, a regular default was entered against Coursen, and he was made a party to the judgment.

One year thereafter, at the July term, 1875, the motion now before us was made by Coursen, to set aside this judgment, which being denied, he brings the record here.

Plaintiff in error complains, that the record does not show the Superior Court had acquired jurisdiction of John B. Young, at the time judgment was rendered against him. The judgment recites due service of process on Young ten days before the first day of the term, and there is nothing in the record to impeach or contradict this. To all appearance the judgment was regular against Young. *Timmerman* v. *Phelps*, 27 Ill. 496.

Plaintiff further complains, that a special deputy could not be appointed to serve the *sci. fa.* upon him, and that he was not properly sworn as a deputy.

By section 10, of ch. 125, title "Sheriffs," R. S. 1874, it is provided, a sheriff may appoint a special deputy to serve any

summons issued out of a court of record, by indorsement thereon, substantially as follows: "I hereby appoint ——— ——— my special deputy, to serve the within writ." Dated and signed by the sheriff. This requirement was precisely observed by the sheriff in this case.

Section 11 requires the special deputy shall make return in the time and manner of serving the writ, under his oath, which was done in this case. This is the only oath the special deputy is required to make.

Plaintiff contends a *scire facias* is not a summons. It is that and nothing more. The statute, ch. 110, title "Practice," provides, in a case like this, where judgment has passed against one joint defendant, that "a summons, in the nature of a *scire facias*, against the defendant not served, may issue," etc. R. S. 1874, p. 776.

But a full answer to all the points made by plaintiff in error is, that his motion to set aside the judgment comes too late. Such a motion can not be made after the term at which the judgment was rendered. *Cook* v. *Wood*, 24 Ill. 295, and subsequent cases; *Windett* v. *Hamilton*, 52 ib. 181.

The citation from Revised Statutes, giving to a motion the same efficacy as a writ of error *coram nobis*, does not change the law of those cases cited. The only object of this legislation was, to dispense with this old writ.

There is no error apparent in this record, and the judgment must be affirmed.

Judgment affirmed.

Syllabus.

JOHN L. DORAN
v.
CATHARINE MULLEN.

1. WILL—*when must be admitted to probate.* The statute has prescribed what is necessary to admit a will to probate, and courts have no power to superadd other conditions or dispense with any portion of those enumerated in the statute; nor has the court the slightest discretion. When a case is made, the court must admit the will to probate, and if the necessary proof is not produced, the court must reject the will.

2. SAME—*what is sufficient proof to admit to probate.* Where one of the witnesses testified that he saw the testator sign the will, and that he signed it at the request of the testator; and the other, that the testator's name was signed to it at the time he witnessed it, and both witnesses testified that they signed it and witnessed it in the presence of the testator and of each other, and that the testator was of sound mind and memory when they witnessed the instrument, and that he was at that time from forty-five to fifty years of age, the requirements of the statute were fully complied with, and the court had no power to reject the will.

3. The fact that a will bears date on the 20th day of the month, and the petition of the proponent of the will for letters of administration states that the testator died on the 17th of the same month, does not tend to prove that the will is a forgery. The more reasonable supposition is, that the proponent was mistaken as to the date of the death, or that a mistake was made in the date of the will.

4. EXAMINATION OF WITNESSES—*when leading questions may be asked.* It is discretionary with the court to permit leading questions to be asked, and when a witness is unwilling, or very ignorant, a fair administration of justice requires that such a course should be allowed.

5. SIGNATURE—*presumed to be affixed understandingly.* Where an instrument is found with a signature affixed to it, the presumption is, that the party signing it knew its contents, and there is no distinction in this respect between those who can and those who can not write.

6. MODE OF TRIAL—*can not be objected to by party consenting to it.* When the question of the probate of a will was, by consent of the contestant, submitted to the circuit court upon the evidence produced in the county court, instead of a trial *de novo*, he is bound by his consent, and can not assign the mode of trial as error on appeal to the Supreme Court.

7. EVIDENCE—*when not pertinent, may be rejected.* It is not error for the court to reject evidence which is not pertinent to the issue, considered by itself, and which is not followed up by any evidence which would make it pertinent.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. CHESTER KINNEY, and Mr. H. D. P. HOSIER, for the appellant.

Mr. T. A. MORAN, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

It appears that one Michael Mullen departed this life some time in the month of October, 1871. Appellee thereupon filed a petition to the county court of Cook county, asking that John L. Doran be appointed administrator of the estate. The prayer of the petition was granted, and Doran gave bond and duly qualified and entered upon the discharge of his duties as such. A will purporting to have been executed and published by Mullen, in his lifetime, was subsequently discovered, and thereupon appellee filed a petition in the county court, praying that the letters of administration granted to Doran be revoked, and the will be admitted to probate. On a hearing in the county court, the will was admitted to probate, the letters of administration previously granted were revoked, and appellee was appointed administratrix, with the will annexed.

From this order Doran appealed to the circuit court, where, on a trial, the court found as did the county court, and the order of that court was affirmed, and Doran appeals to this court, and asks a reversal.

In the circuit court, the evidence of the witnesses taken on the trial in the county court was used by consent of the parties. From this evidence it appears that deceased signed the paper, and asked one of the witnesses to sign it, which he did. And the other witness says he was requested by Evans to sign it. They both testify that testator was present, and one of them that he saw him sign it, and the other that his name was signed to it when he witnessed it; that they wit-

nessed and signed it in his presence and in the presence of each other. They both testify that testator was of sound mind and memory when they witnessed the instrument. They also state that testator was from forty-five to fifty years of age at that time.

On this evidence we fail to perceive any reason why the will should not have been admitted to probate. The requirements of the statute were fully answered, and that being the case, the court had no power to reject the will. The statute has prescribed the rule, and its requirements must be obeyed. Courts have no power to superadd other conditions to the statute or dispense with any portion of those enumerated therein; nor has the court the slightest discretion, but must obey the statute. When a case is made, the court must admit the will to probate, and if the party fails to furnish the necessary proof, the court must reject the will. This is the plain duty of the court, that can not be ignored.

But it is urged that appellee, in both of her petitions, states that Mullen died on the 17th day of October, 1871, whilst the will bears date on the 20th day of that month. And appellant's counsel insist that this is evidence strongly tending to prove that the will was subsequently fabricated for fraudulent purposes, and to procure the revocation of the letters of administration. The more reasonable supposition is, that appellee was mistaken in the date of the death of her husband, or that a mistake was made in dating the will. It would be an unreasonable presumption to say that, because of this discrepancy in dates, the will must be a forgery. We do not see that it tends, in the slightest degree, to prove that fact. Had this inconsistency been pointed out on the trial below, it is more than probable that it could have been satisfactorily explained; but it was not, and it would be unreasonable to permit a party to lie by on the trial, and then raise such an objection for the first time in this court, and then give to it the effect now claimed.

It is also insisted that the court below erred in rejecting

the evidence of Wilder on the trial. He testified that he drew the will at the suggestion and by the dictation of Michael Evans; that it was written in Evans' beer saloon, and on a beer vessel, some time after the fire of October, 1871; that he had never seen or spoken to Mullen, and only wrote what Evans dictated to him, and he handed the paper to him. We regard it as a matter of no consequence whether this evidence was admitted or rejected, as it in nowise overcame the evidence of the two subscribing witnesses, whose evidence stands uncontradicted. They testify that this will was present when they became witnesses to its execution. One of them saw testator sign it, and the other saw it with his signature to it when he signed as a witness.

From these facts, if they are true, there can not be the possibility of a doubt that testator subsequently saw and signed the will, and the presumption is, that he adopted it as his will. If so, then it can not matter who dictated it, who wrote it, or when it was drafted. Evans was on the stand, and he was not interrogated as to whether he or any other person read the will to testator, or how long the will was prepared before it was executed. Had appellant intended to rely upon the will as being spurious, with much earnestness, he could have called Phalan, the other subscribing witness, and learned what he knew in reference to its execution. It is probable that, if the will was a forgery, evidence could have been found to establish the fact. But this record is barren of all such evidence.

It is urged that the court below erred in permitting appellee to ask the witnesses leading questions. Such a course of examination is discretionary with the court. Where a witness is unwilling, or very ignorant, the fair administration of justice requires that such a course be allowed. In this case we judge from the record that these witnesses were far from being persons well informed, if they were not really ignorant. If so, then the court below did not err in permitting leading questions to be put to them. The judge who

first tried the case saw the witnesses, and could better judge than we can, whether such a mode of examination was proper.

It is next urged that, inasmuch as testator signed the will by his mark, and as it was shown that Evans dictated it, it was not entitled to probate until the proponent proved that its contents were read to him. In the first place there is nothing in the evidence to show that testator could not read. The will is found with his signature to it, and the presumption is, that he did not sign it without knowing its contents. Such is the usual presumption in reference to all instruments, and we are aware of no distinction between persons who can and who can not write. Anciently, when but the few could write, and all persons executed instruments by attaching their private seal, the law presumed, when the execution of the instrument was proved, that the maker took the precaution to learn the contents before he executed it. And to avoid it, he was required to prove that it was a forgery. He was not permitted to escape its binding effect by merely showing he did not know its contents, although he, no doubt, might, by showing that it was falsely read to him.

It is objected that the trial was not *de novo*, but the circuit court tried the case on a review of the record from the county court. If this were true, appellant consented that it might be so tried. He consented that the evidence heard before the county court might be used on the trial in the circuit court. Having so consented, he can not now be heard to complain of the trial thus had, because he may now suppose that it would have been more to his satisfaction to have had the witnesses on the stand in the circuit court. He is bound by his consent, and will not be permitted to disclaim his own act. He objects that the court below rejected Wilder's evidence. That in nowise prejudiced him, as it did not tend to invalidate the will. Had it, however, been followed up by showing that the will was not, in fact, read to the testator, and that he was ignorant of its contents, and that he was in such a situation as to be readily imposed upon, or was in fact

imposed upon by designing persons, then his evidence would have formed an important link in the chain to invalidate the will. But, standing alone, it was not pertinent to the issue.

All the evidence considered, we think it was sufficient to entitle the will to be probated. Hence we see no error in the record, and the judgment of the court below must be affirmed.

Judgment affirmed.

THE CITY OF CHICAGO

v.

CAROLINE MCGIVEN.

1. CITIES—*duty of, in constructing sidewalks.* A city is not required to have its sidewalks so constructed as to secure immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution.

2. SAME—*liability of, for defects in sidewalks.* The mere slipperiness of a sidewalk, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damages occasioned thereby.

3. EVIDENCE—*opinions of witnesses—experts.* The opinions of witnesses should not be received as evidence, where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury.

4. On questions of science, skill or trade, where the facts in issue are not themselves accessible by evidence, persons of skill, called experts, are, from the necessity of the case, permitted to give their opinions in evidence.

5. Whether glass placed in a sidewalk to afford light to the area below, is unsafe, by reason of the too great smoothness or slipperiness of its surface, is not a question of science or skill such as to render the opinions of witnesses admissible.

6. PRACTICE—*reading law to the jury, improper.* Counsel should not be permitted, in civil cases, to read law to the jury. It is for the court to instruct the jury as to the law governing the case, and not for them to determine it for themselves by having law books read to them.

7. And it does not obviate the objection, that the reading is for the purpose of illustration only.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. T. LYLE DICKEY, and Mr. FRANCIS ADAMS, for the appellant.

Messrs. HERVEY, ANTHONY & GALT, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This is an appeal from a judgment against the appellant, the city of Chicago, rendered in the Superior Court of Cook county, in an action on the case, brought by Caroline McGiven against the city.

The declaration alleges that, on the evening of December 24, 1873, the plaintiff, while walking on the sidewalk in front of No. 511 Wabash avenue, in the city of Chicago, stepped on a piece of glass which was inserted in the walk, slipped, fell, and sustained injuries, etc.

It is insisted by appellant, the court below erred in admitting improper evidence for the plaintiff.

It appears from the evidence that a piece of glass, some 22x24 inches—a heavy piece of plate glass—was inserted in the sidewalk, the surface of the glass being even with the surface of the surrounding walk. The glass was placed in the sidewalk for the purpose of affording light to the area under the same. On this glass it is alleged that appellee slipped and fell. A number of witnesses were produced by the plaintiff, who gave testimony tending to show that the piece of glass was smooth, slippery, etc. Appellant admits that such testimony, as to the actual condition, etc., of the glass, was proper, and it was not objected to. But the plaintiff, besides, produced a number of architects, and against the objections of the defendant, which were overruled by the court, examined these architects as experts, and proved by them that, *in*

their opinion, a glass, such as that which the evidence showed was inserted in the sidewalk at No. 511 Wabash avenue, was unfit to be used as a part of the walk, and was unsafe for such use.

It is the admission of such opinions in evidence, to which the objection is taken.

The general rule is, that the opinions of witnesses are inadmissible as evidence; that they are to testify to facts, and the jury are to draw the inferences and form the opinions which are to govern the case. The present case is supposed to come within the exception to the rule, that, on questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called *experts,* are permitted to give their opinions in evidence. But this is on the ground of necessity, when the facts in issue are not themselves accessible by evidence, and it is a matter of necessity to call in the experienced or instructed opinion of such witnesses.

The opinions of witnesses should not be received as evidence, where all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. *Clark* v. *Fisher,* 1 Paige, 174; *Mayor, etc., of New York,* v. *Pentz,* 24 Wend. 668; *Linn* v. *Sigsbee,* 67 Ill. 75.

Why was not the glass here, safe? Because of the slipperiness of its surface, especially when there was a little snow upon it.

The question whether the glass was unsafe, by reason of the too great smoothness or slipperiness of its surface, was not a question of science or skill. The decision of that question required no special knowledge, and it was easily determinable by the jury, upon a sufficient description of facts pertaining to the glass, and the use of it in a sidewalk, being given by witnesses. We do not perceive why mere proof of the naked facts could not enable the jury themselves to draw the inference whether the glass was safe or unsafe.

The real question for the jury was, not whether the glass was safe, but whether it was reasonably safe. The not im-

probable effect of obtruding upon the jury the opinions of these architects, that the glass was unsafe, might be that the jury would regard them as deciding the whole question, and so accept them, and repose on them as such, without further inquiry and deciding for themselves, whether the sidewalk might not have been reasonably safe. *Chicago and Alton Railroad Company* v. *Springfield and Northwestern Railroad Company*, 67 Ill. 143.

We think these opinions should have been excluded.

Another point urged by appellant for the reversal of the judgment is, that the counsel for the plaintiff, in the argument to the jury, was permitted by the court, against the objection of the defendant, to refer to and read to the jury from adjudged cases of a similar character. The bill of exceptions shows that counsel thus read to the jury from two pages of one opinion, and read pages of two other opinions in cases decided, two of them by this court, and the other by the Supreme Court of another State. This was a deliberate violation of the rule which has heretofore been laid down by this court upon the subject. *Tuller* v. *Talbot*, 23 Ill. 357; *Sprague* v. *Craig*, 51 Ill. 289.

It was there laid down as the correct practice in civil cases, never to permit counsel to read authorities to the jury; that it was for the court to instruct the jury as to what the law is which governs the case, and not for the jury to determine it for themselves, by having law books read to them—that they must take the law from the court. But counsel say that reference was made to the cases only by way of illustration, and insist the practice was justified by the decision in *Tuller* v. *Talbot, supra;* that there was no error there, as it was there said that reference was only made to adjudged cases, for illustration. But it appears that that was all which was done in that case, it being there distinctly stated that it did not appear that counsel read law to the jury, or read from adjudged cases. Whatever may be avowed by counsel as the purpose

for which authorities are read, that does not obviate the effect of reading them.

We have examined the parts of the opinions read in the present case, and can see that they were, beyond question, read to influence the minds and the verdict of the jury, being well calculated to that end.

The court erred in overruling the objection to the reading thereof, and permitting the same.

The refusal to give the following instruction, which was asked by the defendant, is assigned for error:

"That, if the sidewalk in question was constructed in a proper manner, sufficiently level and smooth for ordinary travel, without obstructions, and so built that it would not, by reason of any peculiarities of its construction, cause snow or ice to accumulate thereon, and if there was no accumulation of snow or ice thereon, and the accident was attributable solely to the slippery condition of that part of the sidewalk, occasioned by a recent fall of snow, and that the sole cause of the accident was the temporary slipperiness of that part of the sidewalk caused by the recent fall of snow thereon, and that, in the absence of snow or ice, that part of the sidewalk, in its ordinary condition, was not unreasonably unsafe, such condition of the sidewalk would not be a defect for which the city would be liable."

The circumstances of the accident in question were, that the plaintiff, who was 66 years of age, on the evening of the 24th of December, 1873, had been visiting at her brother's, 617 Wabash avenue. There had been a very light fall of snow during the evening. About 10 o'clock in the evening, she left for home, with her husband. They walked along upon the sidewalk together, she not having hold of her husband's arm, but had her arms wrapped under her cloak. She slipped upon the glass and, as she testifies, "I came down on my hip. My arm not being out, I could not help it."

The distance between the glass and the stairs leading down

to the basement of the building it is in front of, is two feet eight and a half inches, there being iron balusters to the stairs. The distance between the outer edge of the glass and the curb-stone is fifteen feet. There was evidence tending to show that the glass, in the absence of snow, was safe.

The mere slipperiness of a sidewalk, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damage occasioned thereby. *Stanton* v. *City of Springfield*, 12 Allen, 566; *Nason* v. *City of Boston*, 14 id. 508; *Cook* v. *Milwaukee*, 24 Wis. 270; *Ward* v. *Town of Jefferson*, id. 342; *Cook* v. *Milwaukee*, 27 id. 191.

Where there is snow upon a sidewalk, and it is rendered slippery, there is liability to accidental injury from slipping and falling, in the case of the best constructed walks. There is, at such times, imposed upon pedestrians the necessity of exercising increased care and caution. No doubt, from the evidence, there was a greater liability to accidents of this character, upon the portion of this sidewalk composed of glass, than upon any other part of the walk, and that it was by reason of the material so used, and that this increased exposure to danger might have been obviated by a change of material.

But a city is not required to have its sidewalks so constructed as to secure immunity from injury in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe,—and reasonably safe for persons exercising ordinary care and caution in using them.

The instruction supposes that the sidewalk, in its ordinary condition, was not unreasonably unsafe.

We are of opinion that, under the hypotheses of the instruction, the sidewalk should be regarded as reasonably safe for persons in the exercise of ordinary care and caution, and that the instruction should have been given.

The judgment must be reversed, and the cause remanded.

Judgment reversed.

Mr. CHIEF JUSTICE SCOTT: I dissent to both the reasoning and the conclusion of this opinion, except so far as it holds it was improper to read law to the jury. I concur in that part of the opinion. But, as the error was one that did not affect the merits of the case, I am of opinion the judgment should be affirmed. The glass in the sidewalk was a dangerous structure, and one that could not be seen in the night time so as to be avoided by one although observing ordinary care for his personal safety.

JAMES THOMPSON

v.

BRIGGS W. SORNBERGER.

1. AMENDMENTS *of pleadings.* Under the statute, it is hardly ever too late to amend pleadings, whether before or after verdict, upon such terms as justice may seem to demand.

2. A judgment in an action of forcible entry and detainer was reversed in the Supreme Court on the ground that it was not shown that the defendant was in possession of all the land described in the complaint. When the cause went back on remandment, the circuit court permitted the plaintiff to amend the complaint so as to include only a part of the land therein described, upon the payment of two-thirds of the costs: *Held*, that such leave was properly given.

3. FORCIBLE ENTRY AND DETAINER—*may be brought by heir at law in possession before assignment of dower.* Where the widow, and her son, the only heir of one who died seized of land, continued in possession thereof for twenty-eight years after the death of the owner, dower never having been assigned, and no claim made thereof by the widow, and the son exercised entire control over the land, and worked it as his own, it will be presumed that the mother lived there as a member of her son's family, and not under a claim of dower, and the possession of the son is such as to enable him to maintain forcible entry and detainer against an intruder.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. HANNAMAN & WILLOUGHBY, for the appellant.

Messrs. STEWART & PHELPS, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is an appeal from the judgment of the Warren circuit court, in an action of forcible entry and detainer, brought by Briggs W. Sornberger against James Thompson, resulting in a verdict and judgment for the plaintiff, and to reverse which the defendant appeals.

It appears this case was before this court at the September term, 1871, and the judgment obtained by appellee reversed, on the ground, chiefly, that the plaintiff had not shown defendant was in possession of all the land embraced in his complaint. *Thompson* v. *Sornberger*, 59 Ill. 326.

When the cause came back on the remandment of this court, the plaintiff asked leave to amend his complaint, so as to embrace a part of the strip of land described therein, which the court allowed on payment by the plaintiff of two-thirds of the costs which had accrued in prosecuting the action.

This ruling is the first ground of error complained of by appellant, and in regard to which it is only necessary to say, under our statute, it is hardly ever too late to amend pleadings, whether before or after verdict, on such terms as justice may seem to demand. Such a motion rests very much in the discretion of the court, and we can not say it has been abused in this case.

Brown et al. v. *Smith et al.* 24 Ill. 196, cited by appellant, is not, in principle, like this, nor was the Practice Act, in 1860, when that case was decided, so liberal in its provisions as the present statute. There, the damages recovered were far in excess of the amount claimed in the declaration. The action was on a penal bond, with conditions annexed. Breaches were assigned, and the damages laid at five hundred dollars. The jury found damages to eleven hundred and thirty-one dol-

lars. The court allowed plaintiff to amend by increasing the *ad damnum* to the amount found by the jury, and rendered judgment therefor. The reasoning of the court in that case has no application to this case.

In *Jackson* v. *Warren*, 32 ib. 331, which was forcible entry and detainer, it was said, if no statute interposes to prevent, all amendments are in the discretion of the court, and are allowed or refused, as may be deemed most conducive to justice under the particular circumstances of the case, and that it was usual, on granting leave to amend, to put the party under terms, and if the amendment is material, and calculated to take the opposite party by surprise, to grant a continuance, if demanded.

Hence there could be no surprise, as all the grounds of the action had been gone over in the original trial, and in this trial the effect of the amendment was only to abridge the extent of plaintiff's demand. We see no error in the action of the court in this particular.

The next point made by appellant is, that his possession was with the consent of appellee, and therefore not forcible.

This was a question for the jury, and although there was some testimony giving color to this pretension, it failed to satisfy the jury.

It is next urged, that appellee was not in possession, but his mother was. It is said his mother was in possession as dowress, of the house in which she and her son lived. This claim is set up under section 27 of the Dower Act. That provides the widow may, in all cases, retain the full possession of the dwelling house in which her husband usually dwelt next before his death, together with the outhouses and plantation thereto belonging, free from molestation or rent, until her dower be assigned. The father died twenty-eight years before this action was commenced, leaving a widow, and appellee, his only heir at law, who continued the possession ever since, the son exercising exclusive control over it, paying the taxes and working the farm as his own, his mother

living with him, her dower never having been assigned. It will not do to say, under such circumstances, that the heir at law in actual possession can not maintain this action. From the lapse of time, it may well be supposed the mother resided on the farm as a member of her son's family, and not under a claim of dower, which it is not shown she ever asserted.

As to the instructions, as they were disposed of by the court, they could not, under the testimony, have misled the jury or worked any injury to appellant.

The justice of the case seems fairly to be with appellee, and we affirm the judgment.

Judgment affirmed.

WILLIAM P. HENRY
v.
CHARLES HALLOWAY.

BILL OF EXCEPTIONS — *should show that it contains all the evidence.* Where the bill of exceptions fails to show that it contains all the evidence introduced upon the trial in the court below, it will be presumed, on appeal to the Supreme Court, that other testimony was heard, and that the evidence before the court was sufficient to authorize the judgment rendered.

APPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

Messrs. BOWEN & MOLONEY, for the appellant.

Messrs. RICE & WALBRIDGE, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of ejectment, brought by appellant, in the circuit court of La Salle county, against appellee, to recover the possession of lots 8 and 9, in block 49, in State's addition to Ottawa.

By agreement, a jury was waived, and a trial had before the court, which resulted in a judgment in favor of appellant for lot 9, but as to lot 8 the judgment was in favor of appellee, to reverse which appellant brings the record here by appeal.

On the trial, the appellant, to establish title in himself, read in evidence a deed from the trustees of the Illinois and Michigan canal to Andrew J. Galloway, and also a deed from Galloway to himself.

Appellee, to sustain the issues on his part, read in evidence a tax deed, made by the mayor of the city of Ottawa, August 6, 1868, to Lucien B. Delano, which deed showed upon its face that, at the December term, 1866, of the county court of La Salle county, judgment was rendered against the property, in favor of the city of Ottawa, for a certain sum of money, for the non-payment of taxes, under which, on the 11th day of February, 1867, the property was sold, and purchased by Delano, for the taxes and costs due thereon.

Appellee also read in evidence an act of the General Assembly of the State incorporating the city of Ottawa, section 14 of which prescribes the form of a tax deed on the sale of city property for the non-payment of taxes.

Section 15 of the act is as follows: "Deeds on all sales for taxes and assessments upon real estate, under this charter, shall be acknowledged as other conveyances, and, when executed and acknowledged as aforesaid, they shall be decreed and deemed, and taken to be *prima facie* evidence of the existence and regularity of all such prior proceedings as might otherwise be required to be proven in order to establish the title in the purchaser."

The appellant objected to the introduction of the tax deed, and sections 14 and 15 of article 9 of the act incorporating the city of Ottawa, and now insists that the rule of evidence provided by said section 15 is in conflict with section 4, article 9, of the constitution of 1848, which, in substance, declares that no purchaser of any lands at a sale for the non-

payment of taxes shall be entitled to a deed for the lands purchased, unless such purchaser shall, three months before the expiration of the time of redemption, serve a written notice of such purchase on the person in possession of the land, which notice shall contain the description of the land, when purchased, and when the time of redemption will expire, etc. In like manner, a notice shall be served on the person in whose name the land shall have been taxed, if such person is a resident of the county where the land lies, and if such person does not reside in the county, such notice shall be published in a newspaper; and that such purchaser shall, before he shall be entitled to a deed, make, and file with the person authorized to make a deed, an affidavit of compliance with this provision of the constitution.

Whether the position contended for by appellant is the correct one or not, does not properly arise upon this record, and we express no opinion upon it.

The bill of exceptions contained in the record does not profess to contain all the evidence introduced on the trial; and where the bill of exceptions fails to show that it contains all the evidence introduced upon the trial, we will presume that other testimony was heard by the court, and that the evidence before the court was sufficient to authorize the judgment rendered.

The practice upon this question has been uniform, and is well settled by numerous decisions of this court, and it must be adhered to.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

ALBERT BLISS

v.

JOHN R. SMITH.

1. WAGES EXEMPT FROM GARNISHMENT — *construction of statute.* Under the statute exempting the wages of a defendant, being the head of a family and residing with the same, to the amount of $25, the plaintiff can only recover whatever may be due from the garnishee in excess of $25 at the time of service of the garnishee.

2. The garnishee process will not reach any wages that the debtor may earn after the service, and before the filing of interrogatories and answer.

3. Where the answer of a garnishee stated that the debtor whose wages were sought to be reached had been in his employ from the time of service of process, and had collected bills for such garnishee, and that they had had frequent settlements between the time of service of garnishee process and filing his answer, that he had no means of telling how much he had paid the defendant on account of wages during that time, but that at no time had he owed the defendant to exceed $12, and that defendant was, during all the time, the head of a family, and resided with the same, and the answer was not contested, it was *held*, that the plaintiff could not recover.

4. An employer has a clear right, notwithstanding he has been served with a garnishee process, to pay to his employee his wages, regularly, for the support of his family, so long as the amount due does not exceed $25 at any one time.

APPEAL from the Circuit Court of Stephenson county; the Hon. WILLIAM BROWN, Judge, presiding.

Mr. M. STOSKOPF, and Mr. J. M. BAILEY, for the appellant.

Messrs. BARTON & BARNUM, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The decision in this case turns partly on the construction of that section of the statute which provides: "The wages and services of a defendant, being the head of a family and

residing with the same, to an amount not exceeding $25, shall be exempt from garnishment. In case the wages or services of such defendant in the hands of the garnishee shall exceed $25, judgment shall be given only for the balance above that amount." R. S. 1874, chap. 62, sec. 14.

At the date of the service of the garnishee summons in this case, defendant was indebted to the judgment debtor in the sum of $8, for four days' labor, previously performed. No question is made, that the judgment debtor was, at the time, the head of a family, residing with them. Hence, it follows, under the statute cited, that amount was clearly exempt from garnishment.

The only question in the case is as to the wages subsequently earned by the judgment debtor in the service of the defendant, during the period intervening the service of the garnishee process and the filing of the interrogatories and answer herein.

The theory of the garnisheeing creditor is, that the process will hold all the judgment debtor has earned in the service of defendant, up to the date of filing his answer, deducting but one time $25, the amount exempted by statute. The construction contended for, is as harsh and uncharitable as it is unwarranted. There is no authority, in reason or justice, for saying the statute has any reference whatever to wages subsequently earned by the judgment debtor. The language of the statute is: "in case the wages or services of such defendant in the hands of a garnishee shall exceed $25, judgment shall be given only for the balance above that amount." When in the hands of the garnishee? Obviously at the date of the service of the garnishee summons. The judgment is only to go for the balance exceeding $25, in the hands of the garnishee at that time. The statute has not provided the judgment shall be for any sum the judgment debtor may subsequently earn in the service of defendant; and we have neither the right nor inclination, by judicial construction, to extend its provisions so as to enable the garnisheeing creditor

to reach any wages the judgment debtor may thereafter earn. The statute was enacted for a humane purpose: for the benefit of the debtor's family as well as himself, and should receive a fair and liberal construction, that it may effectuate the beneficent object the legislature had in view. Any other construction than the one we have indicated would render the statute nugatory.

But, aside from this view of the law, the case was heard in the court below on the answer of defendant, and as the case comes before us, we do not see how there could be any recovery. It is set forth in the answer, that on the 18th day of July, following the service of the garnishee summons, defendant was indebted to the judgment debtor, including the $8 earned before service, in the sum of $12, for one week's labor, which he then paid to him. At the end of the next following week, he was indebted to him in the further sum of $12, which he, in like manner, paid. These two amounts being under $25, were, of course, under the statute, exempt from garnishment, and defendant could rightfully pay the same to the judgment debtor.

The last payment was in full of all wages earned up to the 25th of July. On the 27th day of July, the judgment debtor commenced working for defendant as a laborer, and continued in his employ up to the date of filing his answer, at and for the wages of $2 for each working day; that on each Saturday after the 27th of July, defendant had a complete settlement with the judgment debtor, and if anything was found to be due to him, paid in full; that the business of defendant, during that period, was delivering ice to the inhabitants of Freeport and vicinity, and that he employed the judgment debtor to assist him in delivering ice and in collecting the price. The answer further discloses, that frequently between the 27th of July and the date of filing the answer, on the occasions of the Saturday settlement, the judgment debtor was found to be indebted to defendant on account of collections made by him from customers, for ice delivered to them.

Defendant further says, in his answer, he has no means of knowing what amount of money he had paid the judgment debtor for his services from the 27th of July, but avers that at no time, from that date to the filing of his answer, was he indebted to the judgment debtor in a sum exceeding $12, and that ever since the service of the summons, the judgment debtor has been the head of a family, residing with them, and has claimed his wages as exempt from garnishment.

The answer is not contested, and must, therefore, be taken as true. Before any judgment can be rendered in such case, it must appear, from the answer, that the garnishee is liable. It does not appear, from the answer, that any sum was ever due from the garnishee defendant to the judgment debtor from the 27th of July to the filing of the answer. The judgment debtor, during all that time, was collecting money for the garnishee, and frequently at the weekly settlements he was found to be indebted to the garnishee. The answer does not admit that any certain amount was due the judgment debtor, and it therefore affords no data by which a judgment for any particular sum could have been rendered.

But the decision may be placed on broader and more reasonable grounds. If anything was found due to the judgment debtor at the Saturday settlements, if the amount was less than $25, the garnishee had the clear right, under the statute, to pay it over to him for the support of his family, for whose benefit as well as his own the act was passed. Had the judgment debtor quit the service of the garnishee before his wages amounted to $25, it will be conceded the same would be exempt from garnishment. The construction contended for would compel the judgment debtor to quit the service of his employer as soon as his wages should reach $25, and seek employment elsewhere to maintain his family. We are unwilling to give any such narrow and illiberal construction to the statute. The laborer may take up his wages as fast as the same become due, if the amount that shall become due at any one time shall not exceed $25. This construction of

the statute is warranted by the enlightened spirit that prompted its enactment, and we have no inclination to so construe it as to defeat its beneficent designs.

It is, perhaps, proper to say, that in giving this construction to the statute it has no application except to the 14th section cited.

The judgment will be affirmed.

Judgment affirmed.

John L. McCormick

v.

William L. Huse.

1. Allegations and proofs. If the plaintiff in ejectment, in his declaration, describes the land sued for as lying south of the *west* half of a given quarter section, and between the south line of such quarter and a bayou, and the proof shows that his land lies south of the *east* half of the same quarter, he can not recover.

2. Boundaries—*reference to government plat.* Where fractional pieces of land are patented, bounded, in part, by a stream, or bayou, and there is a dispute as to the boundaries, the original plat, or a copy thereof, may be resorted to, and the lines as originally run will control.

3. Where a fractional half quarter section appears, from a government plat made from the original field notes of the survey, to have a clearly defined south line from a common corner of certain sections, 1266 links to a bayou of the Illinois river, which is navigable, and running thence northwesterly to the west line, the patentee and those claiming under him will be restricted to the boundaries as shown by the plat and field notes, and the bayou will form a part of the boundary line.

4. Where a quarter of land is made fractional by a navigable water course, a party receiving a patent for a fractional part of it on one side of the water course, where the area sold to him is noted on the plat of the fractional tract called for by his patent, and the contents calculated, his entry and purchase will not extend across the stream, so as to embrace that part of the quarter on the other side. In such a case, the party purchases by the plat.

Appeal from the County Court of La Salle county; the Hon. Charles H. Gilman, Judge, presiding.

This was an action of ejectment, brought by John L. McCormick against William L. Huse. The opinion of the court states the facts of the case. It also appears, from the record, that. on June 11, 1836, John Dascomb purchased the west half of the south-west fractional quarter of section 20, in the same township with the land in dispute, the patent stating that it contained 52.75 acres, by government survey; that, on July 10, 1844, the United States conveyed the east half of the same quarter to Goodrich Hubbard; that, on June 29. 1835, Hiram Holmes purchased of the United States the west half of the north-west fractional quarter of section 29, containing, according to government survey, 70.70 acres, the east half containing 62.55 acres; that, on November 2, 1865, the plaintiff purchased the north-west part of the north-east fractional quarter of section 29, and the north-east part of the north-west fractional quarter of section 29, and that the quantity of each, as shown by the government surveys, was, the first 2.98 acres and the last 1.85 acres. All the patents and certificates of entry were in the usual form, and, after the statement of the number of acres, were these words: "According to the official plat of the survey of the said lands returned to the general land office by the Surveyor General."

Messrs. Dickey, Boyle & Rickolson, for the appellant.

Messrs. Eldridge & Lewis, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This was ejectment. in the county court of La Salle county, brought to the December term, 1871, by John L. McCormick, plaintiff, against William L. Huse, defendant, to recover the possession of two certain tracts of land, one described in the first count of the declaration as that part of the north-east part of the north-west fractional quarter of section 29, in township 33 north, of range 1 east of the third principal meridian, which lies south of the west half of the south-west quarter

of section 20, in said township, and between the south line of said section 20 and the bayou, or arm, of the Illinois river, which passes through said section 29.

In the other count of the declaration, the tract sued for is thus described: that part of the north-east part of the north-west fractional quarter of section number 29, in township 33 north, of range 1 east of the third principal meridian, which lies south of the west half of the south-west quarter of section 20, in said township, and between the south line of said section 20 and the bayou, or arm, of the Illinois river, which passes through said section 29.

The general issue was pleaded, and submitted to the court for trial without a jury, the defendant admitting he was, at the time of the commencement of the suit, in possession of whatever land there is in section 29, town 33, range 1 east, lying south of the west half of the south-west quarter of section 20, in that township, and north of the bayou of the Illinois river.

To maintain the issue on his part, the plaintiff introduced in evidence a patent from the United States, bearing date May 17, 1866, by which there was granted to him and to his heirs the north-west part of the south-east fractional quarter, and the north-east part of the north-west fractional quarter of section 29, in township 33 north, range 1 east of the third principal meridian, containing 4 $\frac{83}{100}$ of an acre, "according to the official plat of the survey of the said lands returned to the general land office by the Surveyor General."

The plaintiff then produced Daniel F. Hitt, who testified he was a surveyor, and had been more than thirty years, spending twelve of those years in surveying the public lands as a government surveyor, and had been county surveyor; that he was acquainted with section 29; that a large bayou of the Illinois river passes through the north-west and north-east quarters of the section; that he made a survey of the section according to the government survey, and that the plat shown him is a correct representation of the land in the

northern part of the section, and of the adjacent lands lying north of it, being on section 20, and of the location of the several parts thereof, of which map he introduced a copy, and stated that the map was made from an actual survey, made in June, 1871; that, in making this survey, he found the quarter section corner on the section line between sections 29 and 20, which was identified by a stone and two "witness trees" which he found. Witness, at the same time, surveyed that part of the north-west quarter of section 29 which lies north of the "bayou;" that the north line of that quarter, starting at the above named quarter section corner, extends west on the section line 2518 links from said corner, and strikes the bayou. From his knowledge as a surveyor, he testified the boundaries of the north-east part of the north-west fractional quarter of section 29 were as follows: The north line was 2518 links, and the east line 642 links, running south from the above mentioned quarter section corner to the bank of the bayou at low-water mark, and that the south-west boundary was the bayou; that the line on the map marked in d, c, a, shows the north boundary of the bayou at low-water mark, and running from the west end of the northern boundary of the tract at a point 2518 links west of the said quarter section corner, along the bank of the bayou, to the south end of the eastern boundary of the tract, at a point 642 links south of said quarter section corner. He testified the tract within these boundaries overruns the amount called for by the government survey. This witness further testified that no part of the north-east part of the north-west fractional quarter of 29 lies south of the west half of the south-west quarter of section 20, and between that part of said section 20 and the bayou, and that the part of the north-east part of the north-west fractional quarter of 29 which lies south of the west half of the south-west quarter of 20, and between that part of 20 and the bayou, contained about 1 $\frac{9}{100}$ of an acre, as shown by lines at b, c, c, a, on the

plat; that the line a, b, was 518 links long, and the line b, c, 422 links long.

The witness then speaks of trees found by him on the lines run. Into this field of inquiry, in the view we are compelled to take of the case, it is unnecessary to enter.

At the conclusion of this investigation, the defendant produced the book of plats, from the office of the county clerk, which, by agreement, "was received in evidence of the government survey in question."

A plat of sections 20 and 29, copied from this book of plats, is in the record, and we have carefully examined it, and, from our knowledge of the government plats, and from the proofs, we have no question it is a correct copy of the original in the Surveyor General's office, and in the land office where the tracts in controversy were, and by which, these lands were purchased.

It differs, in several important particulars, from Hitt's plat, shown in the record as Map 1, and shows very clearly the two tracts purchased by appellant as one tract, and described in the declaration, and shows with equal clearness that no part of the tracts sued for lie south of the west half of the south-*west* quarter of 20, as appellant has declared, but the tract containing $1\frac{85}{100}$ acres, lies south of the *east* half of said south-west quarter, and the tract described in the first count lies south of the west half of the *north-east* quarter of that section. That is a small fraction lying between the south line of the west half of the north-*east* quarter, and between that and the north bank of the bayou, which, on the plat, is consolidated with the fraction lying south of the east half of the south-west quarter of 20, and in that shape sold to appellant and patented to him. On the plat, the first above described fraction lying south of the east half of south-west fractional quarter of 20, is marked thereon as containing $1\frac{85}{100}$ acres. The area of the two fractions, this being one, is marked on the plat at the point where the east line of the quarter section would run if protracted with the figure 5,

with these marks on each fraction: " ", indicating they are consolidated and to be sold together as one tract containing 5 acres. made up of the north-east part of the north-west quarter of 29, and the north-west part of the north-east quarter of 29, which the plat conclusively shows it is so made up.

For neither of these tracts has appellant declared. His witness, surveyor Hitt, testifies that no part of the north-east part of the north-west fractional quarter of 29 lies south of the west half of the south-west quarter of 20, and between that part of section 20 and the bayou.

In the argument of appellant, this fraction containing $1\frac{85}{100}$ acres is the fraction claimed as part of appellant's purchase, and as part of the $4\frac{83}{100}$ acres specified in his patent. It is, unquestionably, judging from the plat, and which we are bound to take as correct, that part of the $4\frac{83}{100}$ acres lying south of the east half of south-west 20.

No issue has been made up and tried on this tract of land. The affirmation is of a tract of land lying south of the west half of the south-west 20, and between the south line of said section 20 and the bayou. The admission of the defendant is, that he is in possession of whatever land there is in section 29 lying south of the west half of said south-west quarter.

The tract proved by the plat from the county clerk's office, which is a copy from the plat in the general land office, is a tract lying south of the *east* half of the south-west fractional quarter of 20, and south of west half of south-east quarter of same, and the argument of appellant is mainly devoted to the tract claimed to be part of the N. W. of 29.

As we have said, this entry and purchase by appellant is plainly denoted on the government plat, and made one tract by the consolidation of two fractions: one the north-east part of the north-west fractional quarter of 29, which contains $1\frac{85}{100}$ acres; the other, the north-west part of the north-east quarter of the same section, containing land enough, which, added to the $1\frac{85}{100}$ acres, shall make a fractional tract contain-

ing five acres, but no portion of the same lies south of the west half of the south-west fractional quarter of section 20, as appellant has declared. The same appears from the plat attached to appellee's argument.

Surveyor Hitt testifies, the north line of the north-east part of the north-west fractional quarter of 29 is 2518 links, and so made by extending the line from the corner of 29 and 20 west to the bayou. The plat before us, which we must take to be correct, shows no line of that length—it reaches the bank of the bayou at a distance of 1266 chains west. This same line, extended east from this same corner 1675 links to the bayou, is the northern boundary of the land purchased by appellant and patented to him, the southern, eastern and western boundaries being the bayou, which makes a curve between those points of the north line or boundary. Mr. Hitt says his survey overruns the government survey, as it evidently does, and gives to appellant land he has no pretense to claim under his purchase and patent. His patent calls for no land south of the south line of the west half of south-west 20, but is confined to that land which lies south of the *east* half of that quarter, and south of the west half of the south-east quarter of that section. This view reconciles the patent to appellant and the government plat, and establishes appellant's right to all the land north of the bayou, being part the north-west 29, containing $1\frac{85}{100}$ acres, and that part of the north-west part of the north-east quarter of the same section, also lying north of the bayou, containing land enough, when added to the $1\frac{85}{100}$ acres, to make five acres of land.

Mr. Hitt's plat of his survey, made in 1871, if he has correctly platted the old meandered line run by the government surveyors, shows the bank of the bayou was, at that time (1820), but 1268 links west of the corner at 20 and 29, and the line east from that corner was, in 1871, as in 1820, or nearly so, namely: 1625 links. In 1820, one of these lines, the one west to the bayou, was, in length, 1266 links; the other, east to the bayou, was 1675 links, a slight difference,

and which may be accounted for, perhaps, by difference of instruments, and inaccuracy of the different surveyors. Be this as it may, we are fully satisfied appellant is entitled to no land south of the west half of the south-west quarter of 20, lying north of the bayou, consequently he was not entitled to recover any such tract of land.

Whilst upon this case, and to save protracted litigation, as we have thoroughly examined all the questions raised by these parties, it may not be improper to state the conclusions we have reached, as to appellee's claim to any land north of this bayou. His claim is based on Hubbard's patent for the east fractional half of the south-west quarter of 20, he contending that, under that patent, he has the right to extend the east line of that tract to the centre thread of the bayou. The county court so found.

That this claim can not be allowed, can be readily shown. By the plat of which we have spoken, as well as by the plat adopted by appellee in his argument and annexed thereto, the east half of the S. W. 20, patented to Hubbard, is fractional, and is defined on the plat as bounded north by the Illinois river, and a line extending from the bank of the river east to the north-west corner of the south-east quarter of 20; thence south, by a straight line, to a stone, which Hitt found at the south-east corner of the south-west quarter, which was the corner between that quarter and the south-east quarter, and is a corner common to those quarters and to the north-west and north-east quarters of 29; thence west on the south line 1266 links, to the bayou; thence northwesterly, by the bayou, to a point where the west line of this east half strikes the bayou; thence north by a line parallel with the east line of the quarter section, to the Illinois river; thence east with the river, to the right line running east to the north-west corner of the south-east quarter of section 20, containing 74.73 acres of land.

All the government lands in this section were sold by this plat. By it, section 20 is fractional, a great part of it on

an island formed by the Illinois and a bayou. It is not denied, this bayou is navigable. By article 4 of the ordinance of July 13, 1787, it is declared, the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free; and by the act of 3d March, 1803, and 26th March, 1804, and May 18, 1817, it was declared that the navigable rivers and streams through the domain of the United States should be and remain public highways.

By an act of Congress, passed 11th February, 1805, a mode of surveying the public domain was adopted, by the second section of which it was declared that the boundaries and contents of the several sections, half sections and quarter sections shall be ascertained, in conformity with the following principles: 1st. All the corners marked in the surveys returned by the Surveyor General, shall be established as the proper corners of sections or subdivisions of sections which they were intended to designate; and the corners of half and quarter sections, not marked on the said surveys, shall be placed as nearly as possible equi-distant from those two corners which stand on the same line. 2d. The boundary lines actually run and marked in the surveys returned by the Surveyor General, shall be established as the proper boundary lines of the sections or subdivisions for which they were intended; and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which shall not have been actually run and marked, as aforesaid, shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the said boundary line shall be ascertained by running from the established corners, due north and south or east and west lines, as the case may be, to the water course, Indian boundary line, or other external boundary of such fractional township. 3d. Each section or subdivision of section, the contents

whereof shall have been returned by the Surveyor General, shall be held and considered as containing the exact quantity expressed in such return or returns; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the fourth part, respectively, of the returned contents of the section of which they make part.

By the act of May 18, 1796, it is provided, that every surveyor shall note, in his field book, the true situation of all mines, etc., which shall come to his knowledge. These field books shall be returned to the Surveyor General, who shall therefrom make out and transmit to the officers who may superintend the sales, a description of all the lands surveyed; and he shall cause a fair plat to be made of the townships and fractional parts of townships contained in the said lands, describing the subdivisions thereof and the marks of the corners. This plat is to be recorded in a book kept for that purpose, and copies sent to the proper officers.

By the act of April 24, 1820, and April 5, 1832, subdivisions of fractions were permitted. By the act of April, 1820, every section of the public land was regarded as "fractional" which was interfered with by a navigable stream. 2 U. S. Land Laws, Instructions and Opinions, p. 408.

From the plat in evidence, made from the "field books," and the area, calculated as required by law to be done, the south line of the east half of the S. W. fractional quarter of 20, patented to Hubbard, is a clearly defined line, 1266 links west from the common corner of the sections above specified to the bayou, and thence with the bayou north-westerly, and thence, as before described, north to the Illinois river, thence east with the river to the line running to the north-west corner of the south-east quarter of 20. It is apparent, from this plat, no part of either of the tracts patented to appellant forms any part of the south-west 20.

From what we have said in regard to appellant's title, and the position of his land as patented to him, it is obvious,

Holmes' entry and purchase did not extend north of the bayou. The area sold to him is noted on the plat of the fractional tract called for by his patent. The north-west quarter of 29 being made fractional by a navigable water course, the lines run upon the plat and the contents calculated, must, under the act of Congress we have cited, confine him to the south of the bayou—there is no just pretense of a right to extend his lines across this bayou. The plat shows this bayou was meandered by the government surveyors. This is never done on streams not navigable. We here do not speak of streams navigable at common law, where the tide ebbs and flows, but navigable as understood by Congress when the ordinance and subsequent acts of Congress were passed.

No line could be run or corner established on a navigable stream, such as the act of Congress demands. Where such a stream obstructs the line being run, the line terminates at the stream, and extra corners are marked, as this plat shows, as do all other plats of fractions on a navigable stream from the Surveyor General's office. They are constructed with express reference to the law we have cited, and from field books made by sworn surveyors. The fractions claimed by appellant are thirty rods distant from the land bought by Holmes, and this distance a navigable water course.

Holmes, in purchasing the east half of south-west of 29, purchased by the plat in the land office and the contents within the lines delineated on the plat. He saw those lines did not take him across the bayou. If this east half was the half of a full quarter section, he would have, of course, been entitled to 80 acres, unless otherwise specially limited. By the plat, field notes, entry and purchase, he is limited to $62\frac{55}{100}$ acres, and the plat shows that is the exact quantity south of the bayou.

It is claimed by appellee, that quantity is not a reliable description.

This court, in *McClintock* v. *Rogers*, 11 Ill. 279, said, in construing a patent from the United States, which describes

the land granted by the number of the township, section and range, the court would look to the plat and field notes made and returned to the Surveyor General by the government surveyors in order to locate the land. Quantity, although the least reliable and the last to be resorted to, of all descriptions in a grant or deed, in determining the boundaries of the premises granted, may sometimes be considered in corroboration of other evidence.

Now, where the plat is shown, and the number of acres within certain lines and boundaries is clearly specified, can there be more convincing evidence that the quantity specified must be found within those lines and boundaries? We think not. The area may be more or less on a new survey, but by the act of Congress the area noted on the plat is to be taken, for all practical purposes, as the true area.

There is, in our opinion, nothing in this record to justify appellee in asserting a claim under Holmes' entry to any land north of the bayou, and nothing in Hubbard's entry to justify his claim to this triangular piece of land north of the bayou, and between it and the south line of the east half of south-west of 20.

As appellant, however, has not claimed in the pleadings any title to land so situated, the judgment against him was properly rendered, and it must be affirmed. He can, if he desires it, bring his action for the land south of the south line of the east half of the south-west 20, which his patent covers.

Judgment affirmed.

Syllabus.

ANDREW J. ROSS

v.

THE PEOPLE *ex rel.* WILLIAM JOHNSON

1. MANDAMUS—*to compel approval of an official bond.* Where an officer, required by law to execute a bond to be presented to and approved by another officer, before entering upon the duties of his office, presents two different bonds, at two different times, for approval, and both are refused, and he applies for a *mandamus* to compel approval, the petition and the order for the writ should both designate the particular bond to be approved.

2. TOWNSHIP COLLECTOR. The statute requires a township collector to give a bond within eight days after he receives notice of the amount of taxes to be collected by him, and also requires the county clerk to have the collector's books ready for delivery to him within ten days after the first of December, and that the collector shall, within the same time, or as soon thereafter as he is qualified, call at the county clerk's office for the books, and there is no provision for notice being given to the collector of the amount of tax to be collected; hence it is the duty of the collector to call at the clerk's office and there get the notice of the amount of tax, within the time provided by law for the books to be ready for delivery.

3. Where a township collector received from the county clerk an official bond, with the proper amount named in it, for him to execute and obtain securities on, this was a sufficient notice of the amount of taxes to be collected by him, and it was his duty to have the bond executed and presented to the proper authority for approval within eight days thereafter, and his failure to do so was properly deemed a refusal to serve, and the town board were justified in refusing to approve such bond when afterwards presented, and in appointing another person to the office.

APPEAL from the Circuit Court of Lee county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Messrs. WM. E. IVES & SON, for the appellant.

Mr. B. H. TRUESDELL, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In the spring of 1874, Wm. Johnson was elected collector for the township of Viola, in Lee county, in this State. On the 18th day of the following December, the county clerk transmitted to him a blank bond, to be executed by him and sureties. This he received on the next day, and, procuring the signatures of three persons as sureties, he presented the same to the supervisor and town clerk for approval, on the 30th of that month, but the sureties not being satisfactory, they declined to approve it; also, on the ground, as they contend, that it was not presented in time.

On the 2d of January, 1875, the county clerk sent a note to Johnson, notifying him of the amount of tax to be collected in his township. He thereupon prepared another bond, and procured the signatures of sureties, to whose solvency no exception seems to have been taken, and, on the 5th of that month, presented it for approval; but before that time, the township board had appointed another person collector, and they insisted his application was too late, as the time for filing his bond had expired some days previously. He thereupon filed a petition for a *mandamus*, and, service being had, respondent demurred to the petition, but the demurrer was overruled, and thereupon a return was made, and a trial had by the court without a jury, by consent of parties. The court found the issues for relator, and, after overruling a motion for a new trial, entered an order for a peremptory *mandamus* requiring respondent to approve the bond, and he appeals to this court.

The evidence clearly shows that two different bonds were offered for approval. The bonds were unlike in the amount of the penalty, the dates and the makers. Neither of them is described in the petition by the names of the makers, the amount or the date. The execution of each, and their offer for approval, was proved on the trial; and proof was introduced to show that the sureties to each were amply solvent

to render it the duty of respondent to approve these bonds. The trial seems to have proceeded on the theory that respondent was derelict in his duty in refusing to approve either, yet the petition describes neither, nor does it specify either in the prayer, nor has the court, in its order for the writ of *mandamus*, specified which shall be approved. This leaves it uncertain which bond the court intended appellant to approve. Suppose he were to approve one, and relator were to insist the other was intended, and proceed against him for a contempt in refusing to obey the order of the court, how could he justify his action? How could he show that he had approved the bond intended by the court? Suppose he were to approve the first bond presented—in respect to which he doubted, we think with reason, whether the sureties were sufficient, as the most solvent surety was a non-resident, and his fears were well founded—could he not justify himself, under this order, on a proceeding against him for malfeasance in office? Thus it is seen that the petition and order of the court should have designated the particular bond to be approved.

The 133d section of the Revenue law provides that the collector, before he enters upon the duties of his office, and within eight days after he receives notice of the amount of taxes to be collected by him, shall execute a bond, with two or more securities, to be approved by the county board, or the supervisor and town clerk of his town. The form of the bond is given, and required to be in double the amount of such taxes.

The 89th section of the Township Organization law provides that, "if any person elected to the office of collector shall not give such security and take such oath as required above within the time limited for that purpose, such neglect shall be deemed a refusal to serve."

The 85th section requires him to take the oath of office within ten days after being notified of his election, and a failure to do so is deemed a refusal to serve.

The 88th section requires him to give bond as required by law, and we have seen that the 133d section of the Revenue law requires it to be given in eight days after he is notified of the amount of taxes he will be required to collect.

The 141st section of the Revenue law requires the town board, in case the collector shall refuse to serve, or the office shall otherwise become vacant, to proceed to appoint some other person to fill the unexpired term of his office.

The 135th section of the same act requires the respective county clerks, on or before, or within ten days after the 1st of December in each year, to have the collector's books ready for delivery to that officer, and requires the collector, within such time, or as soon thereafter as he is qualified, to call at the clerk's office and receive the books.

These seem to be all the enactments having a bearing on this case. Did, then, the facts in this case warrant the supervisor in refusing to approve these bonds? The first was received on the 19th day of December, and he did not present it for approval until the 30th, eleven days afterwards; but it is insisted that he received no notice of the amount of the tax until the 2d of January, thirteen days after receiving the first bond. We have been unable to find any provision of law imposing the duty of giving the notice to the collector on the clerk of the county court or other person. As the duty is not specifically imposed on any officer, it would seem to be the duty of the collector to call on the clerk and receive the notice, as he, of all others, has the greatest interest in learning the fact; and if it is his duty, he would be required to learn the fact, and have his bond prepared and approved by the time the law requires the clerk to have his books prepared and ready for delivery; and this seems to be the construction given to this provision, as the county clerk testified that he had not, in thirteen years' previous service in the office, ever before given such a notice, and that he had doubts as to whether it was his duty; but be this as it may, the county clerk, on the 18th day of December, sent him a

bond to execute, with the amount of the penalty written in the bond, which was in exactly double the amount of the taxes he was required to collect. He, to ascertain the precise amount of taxes, had but to divide the sum named in the bond and he would have known the exact amount, and he is presumed to have known that the law required the bond to be in double the amount of the taxes. Suppose the clerk had written to him that the bond would be required to be in the sum he had written in that he had sent, and that the taxes were precisely one-half that amount, would any one have the audacity to say that such would not have been sufficient notice? We presume not. And in what does that in principle differ from the case at bar? He was, and now is, seeking the office, and we are at a loss to see any reason why he has a right to require such precision and exactness in matters alone for his interest, and the performance of which is imposed on no other person. If the clerk, as a kindness and favor to him, saw proper to fill out his bond, ready for execution by filling the blanks for the names of the sureties, and for his and their signatures, he has no right to complain that the clerk did not go farther and make the division of the sum named in the bond, and notify him of the result. It was his duty to have done so, and we may, no doubt, imagine he had curiosity enough to prompt him to make the calculation, even if his interest did not prompt such action.

We, then, regard the sending of the bond to relator, and its reception by him on the next day, the 19th of December, as being ample notice; and his failure to present to the town board a good and sufficient bond, within eight days thereafter, for their approval, and the non-compliance with the statute, was properly deemed by them to be evidence that he had declined to serve; and they were, after that time, fully justified in refusing to approve either or both of these bonds when presented, and in appointing another person to the office, as required by the statute.

The court below erred in awarding the peremptory writ of *mandamus*, and the judgment is reversed.

Judgment reversed.

FRANK W. PALMER
v.
THE NASSAU BANK.

1. INDORSEMENT *in blank.* Possession of a promissory note indorsed in blank is evidence of title.

2. ASSIGNMENT—*by and to whom.* No reason is perceived why a bank, through its agent and president, may not, by indorsement, transfer the legal title of a promissory note to such president.

3. AFFIDAVIT OF CLAIM—*when sufficient to require affidavit of merits with a plea.* Where the caption to an affidavit was, "State of Illinois, Cook county, ss.," and the jurat was signed by one purporting to be a notary public, it was objected that it did not appear of what county or State the officer was a notary, or whether the affidavit was made before him in Illinois or some other State: *Held*, the affidavit was sufficient in the respect objected to.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. WALKER, DEXTER & SMITH, for the appellant.

Messrs. HITHCOCK & DUPEE, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit upon a promissory note. The court below struck the appellant's plea of the general issue from the files, for want of an affidavit of merits, and rendered judgment against him by default.

Three objections are urged in reversal of the judgment.

First, that the appellee filed no sufficient affidavit with his declaration to demand an affidavit of merits by the appellant, and hence there was error in striking appellant's plea from the files.

The insufficiency claimed in the affidavit is, that it purports to be sworn to before a notary public, but that the notary failed to state of what county or State he was a notary, or whether the affidavit was made before him in Illinois or some other State. An inspection of the record shows this to be the form of the affidavit:

"*State of Illinois, Cook County, ss. Superior Court of Cook County, April Term, A. D.* 1875.

The Nassau Bank *v.* Frank W. Palmer, Assumpsit."

Then follows the body of the affidavit, with this conclusion:

"This affidavit sworn and subscribed to by Nobbs B. Judah, before me, this 26th day of March, A. D. 1875.

"JOHN L. PARISH, *Notary Public.*"

The objection is not founded in fact. The affidavit is sufficient in the respect objected to.

It is next objected, that title to the note was not shown in the plaintiff, because the blank indorsement was not filled up to him.

Possession of a note indorsed in blank is evidence of title. *McHenry* v *Ridgely*, 2 Scam. 309; *Curtiss* v *Martin*, 20 Ill. 557. The filling up the blank indorsement was a mere matter of form. Besides, the declaration alleges a proper indorsement to the plaintiff, and there being no bill of exceptions in the case, it does not appear from the record that the indorsement was in blank, or that the blank indorsement was not filled up at the trial.

If it were necessary, this will be presumed to have been done, in the absence of evidence to the contrary. The copy of the note attached to the declaration is no part of it.

The suit was upon a note made by appellant to the Cook County National Bank. The declaration avers that the Cook County National Bank, "under the style of B. F. Allen, Pres't," indorsed the note to B. F. Allen, and that the latter indorsed the same to the plaintiff.

It is then further objected, that the president of the bank

could not be both buyer and seller; that in this case such was the fact, and that appellee's alleged title to the note was through a void indorsement.

The indorsement does not appear to have been the act of B. F. Allen, but of the bank, "under the style of B. F. Allen, Pres't;" nor does it appear that the indorsement was in Allen's handwriting; nor that he had anything to do with it; nor that B. F. Allen was president of the bank, there being no bill of exceptions. And even if the facts were as supposed by appellant, we know of no legal inability in the bank, through B. F. Allen, its agent and president, to transfer, by indorsement, the legal title of the note to him, B. F. Allen.

The judgment will be affirmed.

Judgment affirmed.

THE COUNCIL OF THE VILLAGE OF GLENCOE

v.

THE PEOPLE *ex rel.* John A. Owen.

1. SERVICE—*return by deputy must be in principal's name.* If summons is served by a regular deputy of a sheriff, the return must be in the name of the latter. The act of the deputy in such case is, in law, the act of the principal.

2. SAME—*rule different when made by a special deputy.* But where summons is served by a special deputy by appointment indorsed thereon, the statute does not require the return, which is to be made under oath, to be in the name of the sheriff.

3. SUMMONS—*description of municipal corporation sued.* Where the municipal government of a village is vested in a council consisting of a president and five councilmen, a summons in a proceeding for a *mandamus* to enforce a public duty against "the council" of the village, will be good, and it need not be directed to "the president and councilmen" of the village.

4. SERVICE—*upon village corporation.* A summons in a suit against the council of a village, in a proceeding to obtain a *mandamus* to compel the performance of a public duty, is properly served upon the president alone.

5. SAME—*of mandamus.* But a peremptory writ of *mandamus* against a municipal corporation is governed by different principles, and must be served upon those persons composing the council at the time of service.

6. VILLAGES—*right to become incorporated under general law of the State.* Where a proper petition is presented to the council of a village incorporated under a special act or charter, praying for an election to vote upon the question of organizing under the general incorporation law, the council have no discretion to refuse to call the election, but should act upon the same at the earliest convenient moment, and appoint judges to hold the election and give notice of the time and place of holding the same.

7. If the council should unreasonably postpone the time for holding the election, and fail to appoint judges to hold it, or neglect to give the proper notice, the courts will compel them to do their duty in this respect by *mandamus.*

8. MANDAMUS—*as to matters of discretion.* Where a discretion is abused, and made to work injustice, it may be controlled by *mandamus.*

9. SAME—*who may prosecute.* Where the object of a proceeding by *mandamus* is the enforcement of a duty in which the public is interested, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the right in question enforced.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

Mr. CHARLES J. BEATTIE, and Mr. MORTON J. CULVER, for the plaintiff in error.

Mr. JOHN A. OWEN, for the defendant in error.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal is prosecuted to reverse a judgment of the court below awarding a peremptory *mandamus* against "The council of the village of Glencoe." Several errors are assigned, which we shall proceed to pass on in the order of their presentation by the counsel for the respondent. There was no appearance by the respondent before judgment was

rendered, and it is insisted the respondent was not properly brought before the court.

"The village of Glencoe" was incorporated by an act of the legislature, approved March 29, 1869, by section 1, article 2 whereof, it is enacted: "The municipal government of said village shall be vested in a council, consisting of a president and five councilmen, who shall be elected," etc.

The summons runs to "The council of the village of Glencoe." It is indorsed as follows:

"I hereby depute and appoint J. W. P. Hovey special deputy to serve this writ. This 9th day of October, 1874.

T. M. BRADLEY, *Sheriff.*"

"STATE OF ILLINOIS, } ss.
Cook county. }

J. W. P. Hovey, being duly sworn, saith, that he is the special deputy above named, and that he served the within writ on H. B. Wilmarth, president of the council of the village of Glencoe, by reading the same to him, and delivering him a copy thereof, on October 9, 1874.

J. W. P. HOVEY.

Subscribed and sworn to before me this 10th day of October, 1874.

Signed, JOHN A. OWENS, *Notary Public.*"

And his notarial seal is also affixed.

The specific objections made, are: 1st. The return should have been in the name of the sheriff. 2d. The writ should have been against "The president and councilmen of the village of Glencoe," and it should have been personally served on each of them.

1st. If the service had been by a general deputy, it admits of no controversy, the return should have been in the name of the sheriff. In such case, the act is, in presumption of law, the act of the sheriff, and the mere return of the service in his name is, ordinarily, conclusive. This was the English law. (1 Sharswood's Blackstone, pp. 344–5,

and notes); and it is so provided by our statute. (R. L. 1874, Chap. 125, p. 990, § 12.)

But the appointment of a special deputy to make service in a single case, is authorized by other provisions of the statute, having, as we conceive, no dependence upon or connection with those relating to the appointment and duties of general deputies. It must be conceded that it is competent for the legislature to prescribe how and by whom writs shall be served, and what shall be accepted as evidence that they have been served, for we think there can be found no constitutional provision which prohibits the legislature to authorize personal service of process to be made otherwise than by or in the name of the sheriff.

The 10th section of the statute before referred to provides: "A sheriff may appoint a special deputy to serve any summons issued out of a court of record, by indorsement thereon substantially as follows: 'I hereby appoint ——— my special deputy, to serve the within writ,' which shall be dated and signed by the sheriff."

The next section, the 11th, provides: "Such special deputy shall make return in the time and manner of serving such writ, under his oath; and for making a false return, he shall be guilty of perjury," etc. Thus, it will be observed, instead of the requirement being as in the 12th section, where it is required that the general deputy shall act in the name of the sheriff, that is omitted, and it is only required the special deputy shall make return *"under his oath,"* and this, under the pains and penalties of perjury. This difference in phraseology we regard as intended to authorize the return to be made as it was in this instance—the vital requirement being that it shall be *under the oath of the special deputy.* It sufficiently appears, by the appointment indorsed on the writ, and the oath of the special deputy, in what capacity he acted, and the mere form of the return can not, under these circumstances, be held to release the sheriff from liability for his act.

We think the return, although it might have been more formal to have used the name of the sheriff, is sufficient, under the statute.

2d. The duty sought to be enforced is claimed to be imposed upon "The council of the village of Glencoe." No other branch of the municipality has anything to do with it. The writ was, therefore, properly directed. *The People ex rel.* v. *The Mayor, etc., of Bloomington*, 63 Ill. 208.

The object of the writ is to coerce the performance of a duty which is claimed to be obligatory on the council as a body, without regard to the individuals who compose that body. There might, therefore, be an entire change in the members composing the council, without in anywise affecting the proceeding. The duty sought to be enforced, although to be discharged by one branch of the corporate body, is, nevertheless, a corporate duty, and the proceeding might with equal propriety, have been against the corporation, the ultimate result being precisely the same. See Dillon on Municip. Corps. § 701.

We are of opinion, therefore, that service upon the president, which is authorized by § 7, R. L. 1874, p. 775, in suits against villages, is sufficient. The peremptory writ, however, is governed by different principles, and should be served upon those composing the council at the time of the service.

The next question to which our attention is invited is, does the petition show sufficient grounds, conceding, as we must, its allegations to be true, for issuing the peremptory writ?

The allegations material to the question are: The village of Glencoe is incorporated under a special charter; that, on the 16th day of July, 1874, a petition, signed by thirty voters of the village, among whom was the relator, was presented to the council of the village, (the president and trustees of said village, in whom all legislative authority is vested, being designated in the village charter as "The council of Glencoe,") which council was then in session, requesting the council to submit the question, whether said village will be organized as a

village under the act of the legislature of this State, in force July 1, 1872, entitled "An act to provide for the incorporation of cities and villages," to the decision of the legal voters of said village; that, at the same time, a motion was made by a member of the council that the question be submitted to the legal voters of the village, at an election to be called for that purpose on the 4th day of August, 1874, which motion was laid over, by a vote of the council, until the next meeting thereof; that, at the next meeting of the council, no action was had on the petition; that, at a meeting of the council, held on the 10th day of August, 1874, motion was made that the election prayed by the petition be held on the first Tuesday of October, 1874; another member of the council moved to amend this motion by substituting the first Tuesday of April, 1875, for the first Tuesday of October, 1874, which was adopted; and the council then ordered the election prayed for to be held on the first Tuesday of April, A. D. 1875, but did not designate any place for holding the election, or select any judges therefor; nor did they cause any notice to be given of the time and place of holding such election, and they have taken no other action in regard to such election.

It is alleged that the designation of the first Tuesday in April, 1875, is an unreasonable postponement of the time of holding the election prayed for; that it is the day designated by the present village charter for holding the annual election for village officers; that the designation of such time was made with the purpose and intention of unlawfully postponing, and defeating the will of the voters of the village upon the question of reorganization; and it is stated, as the opinion of the relator, that it is the intention of a majority of the council to defeat said election by a failure to discharge the duties enjoined by the law.

It is argued by the respondent, the fixing of the time at which the election shall be held, is a matter of discretion, in which the council can not be interfered with by the courts.

By section 1, article 11, of the statute relating to "cities, villages and towns," (R. L. 1874, p. 242,) it is enacted: "Any town in this State, incorporated either under any general law for the incorporation of towns, and acts amendatory thereof, or under any special act for the incorporation of any town or village, may become organized as a village, under this act, in the manner following: Whenever any thirty voters in such town shall petition the president and trustees thereof to submit the question, whether such town will become organized as a village, under this act, to the decision of the legal voters thereof, it shall be the duty of such president and trustees to submit the same accordingly, and to fix a time and place within such town for holding such election, and to appoint the judges to hold such election, and to give notice of the time, place and purpose of such election by causing at least five notices thereof to be posted in public places in such town, for at least fifteen days prior to holding such election."

It is obvious, the council had no discretion, when the proper petition was presented, whether the prayer of the petition should be granted or not. The petition being in conformity with the statute, it was the plain duty of the council to act upon it at the earliest convenient moment, fix the time and place of holding the election, select the judges therefor, and give the required notice thereof. But, inasmuch as no time is designated by the statute when the election shall be held, there was some discretion, necessarily, in the council, in this regard. The implication of law, however, is, that the time fixed should be within a reasonable period, in view of all the circumstances. Precisely what would be a reasonable period, might, in many instances, be of extremely difficult solution; instances of what would be an unreasonable period, can more readily be imagined, which will serve the present purpose for illustration. Had the election been postponed for ten years, or even five years, it would need no argument to show that it would amount, practically, to a denial of the right guaranteed to the petitioners. No

one would pretend the discretion vested in the council could justify this. So it would seem to be equally clear, that any postponement, not authorized by some apparent public necessity, would be unjustifiable. The discretion vested in the council can not be exercised arbitrarily, for the gratification of feelings of malevolence, or for the attainment of merely personal and selfish ends. It must be exercised for the public good, and should be controlled by judgment, and not by passion or prejudice. When a discretion is abused, and made to work injustice, it is admissible that it shall be controlled by *mandamus*. Tapping on Mandamus, (Am. Ed.) 66.

The change desired to be effected in the municipal government of the village, through an election, was such as materially affected every citizen and tax-payer of the village. The petition was based on what were supposed sufficient reasons, having reference to the *then existing* state of affairs. If reform, to be brought about through this means, was needed, and desired by a majority of the voters of the village, it was a wrong and an outrage that they should be compelled to submit to the evils they labored under, for another year, when the change might reasonably be effected within a month. If there were leeches on the treasury—a vicious revenue system, imperfect police regulations—in the opinion of a majority of the voters, to be gotten rid of only through change in the organic law, they were entitled to have the change made as soon as it was practicable, and every day they were forced to submit to the continuance of the evils beyond that period, was so much arbitrary oppression by the council.

We can imagine no public necessity justifying the postponement of the election from the 16th day of July, 1874, to the first Tuesday of April, 1875. It has every appearance of an attempt, on the part of those filling the council, to perpetuate their own power to the utmost possible period, notwithstanding and in defiance of the wishes of the people. It is not admissible that this conduct shall be excused by the respondent assuming that a majority of the electors did not concur with

the thirty petitioners, and therefore the election would have involved the village in useless expense. That was the question to be settled by the election, and it could in no other way be settled. The law gave the thirty electors the right to have the election, and to have it within a reasonable time, and its unnecessary postponement was in violation of that right.

The allegation of the petition, moreover, that this postponement was to defeat the will of the electors, is, by the default, to be taken as true. Thus, it is conceded, the discretion in the council was abused, and perverted to the attainment of an unjustifiable end.

If this postponement may be excused, it must follow, the council may, in the exercise of its discretion, indefinitely postpone the calling of the election, between which, and an absolute refusal to call the election, the distinction is only in form, and not in substance.

We have no hesitancy in saying the case is one in which *mandamus* properly lies.

The only remaining objection is, that the prosecution is carried on by a private citizen, and not by a public prosecutor.

The relator shows that he is a resident, voter and tax-payer of the village.

It was said, in *The County of Pike* v. *The State*, 11 Ill. 207. "The question, who shall be the relator in an application for a *mandamus*, depends upon the object to be attained by the writ. * * * Where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested, as a citizen, in having the laws executed, and the right in question enforced." See, also, *City of Ottawa* v. *The People*, 48 Ill. 235; *Hall et al.* v. *The People*, 57 id. 310.

These cases hold a different rule from that announced by the cases referred to by the respondent, but are conclusive here.

The public prosecutor might, undoubtedly, have instituted this prosecution, but his failure to do so is no reason why the citizens, tax-payers and voters of the village shall be denied the right to have the council perform its duty.

The remarks in *The People ex rel. Stine* v. *Supervisors*, 47 Ill. 259, referred to by the counsel for respondent, are not pertinent. They had reference simply to a contract, in which the contracting party was asking no aid of the court, and had no allusion to the case of a failure to perform a public duty.

We are of opinion there is no error in the record, and the judgment must therefore be affirmed.

Judgment affirmed.

First National Bank of Chicago

v.

James W. Beresford.

1. Justice of the peace—*practice in courts of.* Under the practice which has existed, for many years, in justices' courts, it is the duty of the justice to hold a case open one hour after the time named in the summons for a defendant to appear, but he is not required to wait longer before rendering judgment. At the expiration of the hour, it is his duty to call and dispose of the case, and the presumption is, that he does so.

2. Certiorari—*under the statute.* The facts required by the statute, to authorize a writ of *certiorari* to remove a cause from a justice of the peace to the circuit court, must be *shown* by the petition, not merely alleged as a conclusion of the party.

3. A petition for a writ of *certiorari* stated that the defendant appeared at the office of the justice of the peace two hours after the time he was required by the summons to appear, and was then informed by a clerk of the justice that no judgment had been rendered against him, and that none could be rendered after that time: *Held*, that a clerk of a justice of the peace is an officer unknown to the law, and, if a party acts upon information obtained from that source, it will be at his peril.

4. Where the petition states that the petitioner appeared after the time he was required by law to do so, and was informed by a clerk of the justice that no judgment had been rendered, and this statement is followed

by an allegation that the judgment was afterwards rendered, this allegation is but a conclusion of the party based upon such information, and is not sufficient to show that the judgment before the justice was not the result of his own negligence.

5. If the petition had stated that he examined the docket and found no judgment, and based the allegation that the judgment was rendered afterwards, upon that fact, the averment would have been good.

Appeal from the Circuit Court of Cook county; the Hon. Henry Booth, Judge, presiding.

Messrs. Hitchcock & Dupee, for the appellant.

Messrs. Barnum & Crane, for the appellee.

Mr. Justice Craig delivered the opinion of the Court:

Appellee, on the 6th day of March, 1875, obtained a judgment before a justice of the peace, in the city of Chicago, against appellant, for the sum of $121.15.

After the expiration of twenty days, allowed by the statute for an appeal, appellant removed the cause into the circuit court of Cook county, by *certiorari*.

The circuit court, on motion, quashed the writ and dismissed the appeal, on the ground that the petition was insufficient.

The statute requires that the petition shall set forth and show, upon the oath of the applicant or his agent, that the judgment was not the result of negligence in the party praying the writ, that the judgment is unjust and erroneous, and that it was not in the power of the party to take an appeal in the ordinary way.

In the case of *Russell* v. *Pickering*, 17 Ill. 31, it was held, that the three facts required by the statute must be *shown* by the petition, not merely alleged as a conclusion of the party. It appears, from the petition filed in this cause, that the process issued by the justice, and served upon the appellant, was returnable on the 6th day of March, 1875, at 9 o'clock A. M.;

that the appellant did not appear at the office of the justice, until the hour of 11 o'clock A. M.

Under the practice which has existed for many years, in justices' courts, we apprehend it was the duty of the justice of the peace to hold the case open until 10 o'clock, as the defendant was summoned to appear at 9 o'clock, but we are aware of no authority that would require the justice to wait another hour for the defendant to appear and make a defense to the action.

No excuse or reason, whatever, is shown by the petition, for the failure of appellant to appear before the justice within the time required, to enable him to interpose a defense to the action.

Under such circumstances, where no diligence is attempted to be shown, in defending the suit, within the time required by law for the defendant to appear and defend, it can not, in justice to the rights of both parties, be said, that the judgment before the justice was not the result of negligence of appellant.

The petitioner, however, seeks to avoid the provision of the statute which requires him to show that the judgment before the justice was not the result of his own negligence, by an allegation that when he did appear at the hour of 11 o'clock, in the absence of the justice, he was notified by a clerk of the justice of the peace that no judgment had been rendered and that no judgment could, after that time, be entered against him. Then follows an allegation that the judgment was rendered after that time, by the justice of the peace.

A clerk of a justice of the peace is, however, an officer unknown to the law. Appellant had no right to rely upon any information obtained from him, and if he saw proper to act upon information obtained from that source, it must be at his peril.

The docket of the justice of the peace was in the office when appellant appeared, and if he desired to learn whether a judgment had been rendered against him or not, an inspec-

tion of the docket would have given reliable information, upon which he could, with safety, have acted, but, although appellant had the opportunity and right to examine the docket, it was not resorted to.

The allegation in the petition that the judgment was rendered after appellant had left the office, when considered in connection with the other allegations, is but a conclusion of appellant based upon the information derived from the clerk.

The petition shows that the summons was returnable at 9 o'clock A. M. At 10 o'clock, it was the duty of the justice to call the case, hear the evidence, and render a judgment. In the absence of proof to the contrary, we must presume the justice did his duty.

If appellant, when at the office of the justice of the peace, had examined the docket, and found no judgment rendered against him, and based the allegation that a judgment was entered after that time, upon such fact, the averment in the petition would, no doubt, have been good, but the petition as framed does not show that degree of diligence required by the law, and the circuit court did right in dismissing the appeal.

The judgment will therefore be affirmed.

Judgment affirmed.

JOSEPH MORLEY

v.

THE TOWN OF METAMORA.

1. OFFICIAL BOND—*liability of sureties.* Where a supervisor is elected his own successor, and gives a new bond, the sureties are liable on such bond for any amount which appears to have been in the hands of such supervisor belonging to the town, at the end of the preceding official term.

2. A supervisor was elected for a second term, and at the end of the first term made a report, showing a certain amount in his hands belong-

ing to the town, which report was approved: *Held*, that such report must be considered as true, and that such amount was in his hands as his own successor, and that the sureties on his bond for the second term are liable for a failure on his part to account for it.

APPEAL from the Circuit Court of Woodford county; the Hon. JOHN BURNS, Judge, presiding.

Messrs. CLARK & ELLWOOD, for the appellant.

Messrs. CHITTY & PAGE, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This action is upon the official bond of a supervisor, to recover money which, it is alleged, he had in his hands at the expiration of his term of office, and failed to pay over to his successor, on proper demand being made. The condition underwritten the bond is in the usual form, and is in conformity with the provisions of the statute.

The principal in the bond was first elected supervisor in April, 1872, and was elected his own successor in April, 1873. The sureties on the bond given in the first year were not the same as on the one given the second year. It appears that, just before the expiration of the first term for which he was elected, he made a report, to the proper officers of the town, that he then had in his hands an amount of money about equal to the present judgment. His report was approved. On his re-election he gave a new bond, and entered anew upon the discharge of the duties of his office. It is upon this bond the action was brought.

It further appears, that during the last year the supervisor accounted for an amount of money about equal to the amount by him received during that year. The defense is, the defalcation all occurred during the first year, and hence the sureties on the first bond are liable for it.

There is no contest that the amount recovered is due from the supervisor to the town, but the question is, upon whom

is the liability for the default, whether upon the sureties on the first or the second bond.

It is not made to appear very clearly, that whatever default occurred took place in the first year the supervisor was in office; but, conceding that fact, we do not think it relieves the sureties on the bond upon which this action is brought, from liability. The supervisor was his own successor in office. He had made his annual report, in which he charged himself with having a certain amount of money in his hands. That report was approved, and we must presume it was true. When he was re-elected, it was in his hands as his own successor. These facts appeared upon the public records of the town. The new securities upon the official bond of the supervisor must be held to have had notice of what appeared on the public records. In contemplation of law, the money mentioned in his report was in the hands of the supervisor, and the undertaking of the sureties on his bond was that he should account for it. It was as much his duty to account for whatever funds were in his hands at the end of the first year, as it was to account for whatever should be received during the second year. The law made the sureties responsible for any default in that regard. There could be no action maintained against the sureties on the first bond at the expiration of that year, for there was no one who could make a demand for the money the supervisor reported as having in his hands, so as to establish a default.

This case, in principle, is not unlike *Pinkstaff* v. *The People*, 59 Ill. 148. In this case, as in that, the principal stood chargeable with certain funds, and the legal effect of the undertaking of the sureties is, that he should pay the same to his successor in office, on proper demand being made.

The judgment is warranted by the law and the evidence, and must be affirmed.

Judgment affirmed.

SOPHIA C. NEWMAN

v.

WELLS WILLITTS.

1. HOMESTEAD—*only exempt to the extent of* $1000. Where the land occupied by a defendant in execution is worth more than $1000, he is not entitled to have the whole of it set off to him.

2. Where 40 acres of land were levied on under execution, and claimed by the defendant as exempt, and the sheriff summoned six householders, who set off a portion of the same, including the dwelling house, out houses, barn, spring and garden, worth fully $1000, in conformity to the provisions of the statute, this was all the defendant was entitled to, and the sheriff was authorized to sell the residue of the land under the execution.

3. SAME—*how set off to defendant in execution.* An execution was levied on land occupied by defendant as a homestead, and the officer made return to that effect, and also returned the affidavit of six persons, naming them, in which they described themselves as householders and residents of the county where the land was situated, and stated that they had been summoned by the sheriff to appraise and set off the homestead of the defendant in the execution in and upon the land, and taken the oath required in such cases. These persons set off to defendant in execution a portion of the land, embracing the dwelling house, barn, orchard, garden, etc., worth fully $1000: *Held*, that the homestead was set off in conformity with the statute.

WRIT OF ERROR to the Circuit Court of Mercer county the Hon. GEORGE W. PLEASANTS, Judge, presiding.

Mr. B. C. TALLIAFERRO, for the plaintiff in error.

Messrs. PEPPER & WILSON, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This is a writ of error to the Mercer circuit court, to bring up the record of the proceedings in an action of forcible entry and detainer, heard in that court on an appeal from a justice of the peace, in which action Wells Willitts was plaintiff and Sophia C. Newman was defendant.

A jury being waived, the court tried the issue between the parties, and found for the plaintiff.

There is nothing in the points made by plaintiff in error. The decree of the circuit court in favor of defendant against plaintiff, found that Mrs. Newman had a life estate in certain lands (describing them), and decreed that the judgment in favor of defendant against her be revived, and that execution issue thereon, and that the sheriff should cause to be set off to plaintiff in error her homestead, out of the described lands, and that he sell the remainder to satisfy the judgment.

Defendant in error, the party plaintiff in this decree, after the entry of the same, sued out an execution against plaintiff in error, and placed the same in the hands of the sheriff of the county, to be executed. The sheriff levied the writ on the lands described in the decree, and so returned, and, at the same time, made return of the affidavit of six persons, naming them, and describing themselves as householders and citizens of Mercer county, and reciting therein that they had been summoned by the sheriff to appraise and set off the homestead of plaintiff, in and upon said lands, and made the oath required in such cases.

It would appear, the portion set off to plaintiff was ten acres, embracing the dwelling house, barn, out houses, spring and garden, and twenty acres adjoining, embracing the orchard, all lying in a compact body, and worth fully $1000, and making a very comfortable home. The balance of the land was sold by the sheriff to defendant, and after the time of redemption expired, he received the sheriff's deed therefor.

A demand for possession of these lands being refused, this action was brought.

The homestead was set off, for aught we can see, in conformity with the statute, and complaint of plaintiff, that the whole forty acre tract was not given to her, has no foundation. She has a homestead worth one thousand dollars and more, and thus has the demand of the law been satisfied. It is stipulated, the entire forty acres were worth more than one

thousand dollars, consequently she was not entitled to them as a whole.

We perceive no error in the record, and affirm the judgment of the circuit court.

Judgment affirmed.

ELIZABETH M. GLEASON

v.

VILLAGE OF JEFFERSON *et al.*

1. INJUNCTION—*to prevent improving land as a street, complainant must show title.* To entitle a party to a perpetual injunction to restrain the grading and improving of land as a street, he must show that he is the owner of such land; proof, merely, that he is in possession will not be sufficient.

APPEAL from the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

Mr. DAVID S. PRIDE, for the appellant.

Mr. S. M. DAVIS, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellant filed a bill to enjoin the village of Jefferson and its street commissioner from grading and improving as streets certain strips of ground in the village. She, in her bill, alleges that she is the owner in fee simple of the premises in controversy, but, on the hearing, she made no proof of title, either by the production of deeds or other title papers. She did not even prove that she was in possession of the *locus in quo*. The court below, on the hearing, dissolved the temporary injunction and dismissed the bill, and complainant brings the case to this court by appeal, and seeks to reverse the decree of the court below.

That it must appear in evidence, or from the answer or stipulation and admissions of defendants, that appellant was the owner, as alleged, or at least was in possession of the premises in controversy, before the relief sought can be granted, is undeniably true. That a party to any form of litigation, whether at law or in equity, must show a valid right before he can recover, is axiomatic. The rule is strictly elementary, and lies at and is the basis upon which all systems of jurisprudence are founded. It is only to protect and enforce rights, that governments are formed, laws adopted and courts are founded, and officers of the law maintained. The party claiming a right in the courts must prove or otherwise establish the right, before the courts will interfere to put him in possession of the right, or interfere to protect, maintain or enforce the right.

But in this case it is insisted that appellees admitted, by their answer, that appellant was in possession of the premises. Even if the admission of possession, in such a case, could be held to prove the allegation of ownership in fee, still we fail to find such an admission in the answer, either in terms or in effect. In the actions of trespass and case, a mere possession is sufficient to justify against a mere wrongdoer, or to recover against him for invading the possession of the occupant; but where a person claims a perpetual injunction restraining others from doing what is, or appears to be, sanctioned by the law, it would seem that something more than a mere naked possession should be shown. It seems to us that to restrain the making of a public improvement in which the whole, or a large portion, of the people have an interest, should not be restrained on such slender evidence of right. Shall it be said that a mere trespasser, or a tenant at will, or for a year, may obtain a perpetual injunction, and prevent the opening of roads or streets which may be of the greatest utility to the public, by simply showing that he is occupying adjoining land?

Appellant's counsel, manifestly, in drafting the bill, did not

so understand the law, as he alleged ownership in fee simple in complainant. If a mere naked possession was all that was required, why should he have done more than allege it? A perpetual injunction is not, nor should it ever be, decreed, except on the establishment of the clearest and most satisfactory right, and that fully established. It is not like a trespass for merely invading a possessory right, but it concludes the assertion of an adverse right for all time to come. Not so in trespass, as there, as a general rule, no one's ultimate or superior right is affected; whilst here, were the relief granted, the village could never assert the right to open the street, under any existing plat or dedication, however perfect the right, against appellant, or her heirs or assigns. To so decree, would be an abuse of the restraining power of the court.

But it only appears that the husband of complainant had commenced to erect a fence in the street when these proceedings were commenced, as we understand the answer; but suppose he had completed the fence in the center of the street, for its entire length, to which side of the fence would counsel refer his possession—on the side on which his wife's property is situated, or the other, or on both, thus giving him possession of the entire street? We presume not the latter, because he nor his wife either claimed any interest in the other side of the street, opposite to her property; nor does it appear, from the answer, that he was acting for his wife, or in reference to her property.

Again, where possession is relied on, the acts must be public, open, hostile in their character and unequivocally indicate to the world what property has thus been reduced to possession. Where a house or field is placed on a tract of land, all know that the ground embraced in the inclosure is reduced to possession, and have reason to believe, if not embracing the entire tract on which they are situated, that the possession is more extensive than the mere inclosure, and hence the deed under which the right is claimed to make the improvement may be shown to explain the extent of the claim

and possession; but a string of fence running along and in the center of a road indicates or suggests no other or greater possession than the ground actually occupied by the fence.

The entire record considered, we fail to find that complainant has made such a case as entitles her to the relief asked, and the decree of the court below is affirmed.

Decree affirmed.

Conrad Ross

v.

Eliza Ross.

1. Alimony—*amount allowed.* Courts of equity will act upon a rule of just and fair proportion of the alimony allowed, to the estate of the defendant, in rendering a decree for alimony.

2. A decree which gives to the complainant as alimony, substantially, all of the defendant's property, is manifestly wrong.

3. Same—*vesting the fee in the wife.* The practice of vesting the fee of real estate in the wife, by a decree for alimony, although sometimes sanctioned by this court under special circumstances, is objectionable.

4. Unless there are special reasons to the contrary, the better mode of decreeing alimony is, by an annual allowance, to be held under the control of the court, secured upon the property, or a life estate in the property.

5. Same—*for purpose of paying defendant's debts.* Where a decree for alimony gave to the complainant, substantially, all the defendant's property, and ordered her to pay his debts, it was evident that a portion of the alimony allowed was for the purpose of paying such debts, and it was *held*, that such decree was without precedent, and unwarranted.

Writ of Error to the Circuit Court of Peoria county; the Hon. Sabin D. Puterbaugh, Judge, presiding.

Messrs. Cooper & Bassett, for the plaintiff in error.

Messrs. Cratty Bros., for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a bill for divorce, brought by Eliza Ross, against Conrad Ross, to the March term, 1871, of the Peoria circuit court, alleging, as grounds of divorce, habitual drunkenness for two years, and extreme and repeated cruelty on the part of the husband. The bill was taken for confessed, and a decree of divorce granted at that same term.

Objections are taken by Conrad Ross, the plaintiff in error, to so much of the decree as relates to the allowance of alimony to the complainant.

The court below decreed the custody of the children to the complainant, they being four in number, the oldest twelve and the youngest two and a half years old; and decreed that the complainant have for permanent alimony all the personal property of the defendant, except such notes as he owned, and that she should have all his real estate in fee; that she should pay the costs of the suit and all the debts of the defendant which he owed at the time of the commencement of the suit.

The bill alleged that the defendant owned a stock of groceries in the store where he carried on business, and other personal property, amounting in value to about $2000, and certain described real estate, worth $3000 or upwards, describing it, consisting of various lots in sundry additions to the city of Peoria.

This is all the showing of any kind that there is in the record as to any property of the defendant. There is no proof whatever preserved in the record, if any were had.

The decree is manifestly wrong in the extent of alimony allowed the complainant. Nothing appears as to the amount of the notes left to the defendant, but, from the showing of the bill, we can not suppose them to have been of much amount, so that the decree took for alimony, essentially, all of the defendant's property.

Bishop, in his work on Marriage and Divorce, vol. 2, 463

(5th ed.), lays it down that "the rule as to proportion of alimony to income, as settled in England, ranges from one-half —which is the highest, but not unfrequently allowed where the bulk of the property came originally from the wife, and where there is no power in the court to restore any part of it *in specie*—to one-third, between which points it appears mostly to vibrate, though at some times considerably lower."

This serves to show, that there is some rule of just and fair proportion of the alimony allowed, to the defendant's estate, which courts of equity act upon in the allowance of alimony—that they do not take all of the defendant's property. There was here an entire disregard of any such rule.

The mode of allowance of alimony in vesting the fee of real estate in the wife is objectionable. While such practice has, in some instances, been sanctioned by this court, it has been under special circumstances. In *Von Glahn* v. *Von Glahn*, 46 Ill. 136, and *Keating* v. *Keating*, 48 id. 241, such practice was disapproved of, and it was said, that unless there are special reasons to the contrary, an annual allowance, to be held under the control of the court, is the better mode of decreeing alimony. In the latter case, the decree of the lower court, giving the complainant the fee of certain real estate instead of a life estate or an annuity secured upon the property, was reversed, the court remarking: "If the property was not bought with her (complainant's) money, there was nothing in the case calling for a divestiture of the fee," and see *Russell* v. *Russell*, 4 Green (Iowa), 26.

Another unwarranted feature of the decree was, in decreeing the payment by complainant of the defendant's debts. We know of no precedent for such a decree.

Some part of the allowance of alimony, how much being entirely uncertain, must have been for this unwarranted purpose of paying the defendant's debts.

The decree, so far as it respects the allowance of alimony, the injunction against the defendant with regard to his property, and the payment of the defendant's debts, will be re-

versed, and in all other respects it is affirmed, and the cause is remanded for further proceedings consistent with this opinion.

Decree reversed in part.

CHARLES H. TUGMAN

v.

THE CITY OF CHICAGO.

1. MUNICIPAL CORPORATIONS — *ordinances must not be unreasonable.* Where power is conferred upon a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, it can not, in the exercise of that power, enact ordinances that are unreasonable, oppressive, or such as will create a monopoly.

2. An ordinance which makes an act done by one penal, and imposes no penalty for the same act done, under like circumstances, by another, can not be sanctioned or sustained, because it would be unjust and unreasonable.

3. An ordinance which prevents one citizen engaging in a particular kind of business in a certain locality under a penalty, whilst another is permitted to engage in the same business in the same locality, is not only unreasonable, and therefore void, but its direct tendency is to create a monopoly, which the law will not tolerate.

4. The fact that certain persons were engaged in a particular kind of business in a given locality at the time of the adoption of an ordinance, would not authorize the municipal corporation, by such ordinance, to permit such persons to continue their business, whilst it prohibited others from engaging in the same business in the same locality.

5. LEGISLATIVE POWER—*to whom it may be delegated.* The legislative power is vested by the constitution in the General Assembly, and ordinarily it can not be delegated. The right, however, of the legislature to empower municipal corporations to make by-laws and ordinances for the welfare and government of the inhabitants of the corporation, can not be denied.

6. Where such power is conferred upon a municipal corporation, it is exercised by a body elected by the people to be affected; but if the legislature possess the power to delegate legislative authority to a body to be appointed by some judicial officer of the State, the people of the corporation might be deprived of self-government; they would be governed by

a body they had no voice in electing, which is repugnant to our theory of government.

7. BOARD OF HEALTH OF CHICAGO—*power to regulate the business of slaughtering.* Where one section of an act of the legislature conferred general power upon the board of health of a city to enact such by-laws, rules, regulations, etc., as they might deem advisable to promote and preserve the health, safety and sanitary condition of the city, etc., and another section of the same act provided, that the common council of the city should have power to regulate and control the slaughtering of all animals in the city, etc., it was *held*, that whilst the former section, taken by itself, was broad enough to confer power on the board of health to regulate slaughter houses, etc., yet, when considered in connection with the latter section, the power was in the common council, and not in the board of health.

APPEAL from the Criminal Court of Cook county; the Hon. WILLIAM W. FARWELL, Judge, presiding.

Messrs. TULEY, STILES & LEWIS, for the appellant.

Mr. RICHARD S. TUTHILL, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a prosecution, originally instituted before a police magistrate by the city of Chicago, to recover from Chas. H. Tugman a penalty of $10, for the violation of a regulation or ordinance adopted on the 12th day of December, 1871, by the board of health of the city of Chicago, which reads as follows:

"That from and after the first day of January, A. D. 1872, no distillery, slaughter house, rendering establishment or soap factory shall be erected or put into operation in any building not now used for such purpose, within the territory in the city of Chicago bounded as follows, to-wit: Fullerton avenue on the north, Thirty-fifth street on the south, Lake Michigan on the east, and Western avenue on the west."

The cause was taken by appeal from the police court to the criminal court of Cook county, where, upon a trial, judgment was rendered against appellant, for the sum of $10.

It is conceded that appellant owned a slaughter house within the limits designated by the ordinance, which was erected and put into operation after the 1st day of January, 1872, and at the time, and prior to the commencement of the action, he was engaged in slaughtering cattle therein, both for packing and city consumption.

It is also conceded, by both parties, that at and prior to the commencement of the suit, several other slaughter houses were in operation in said city, within the limits designated in the regulation, which were erected and in operation prior to the adoption of the ordinance.

There being no dispute as to the facts, the only question presented by the record is, whether the regulation or ordinance adopted by the board of health is valid or void.

The first position of appellant is, that the regulation is void, because it is unreasonable and oppressive.

Where power is conferred upon the legislative department of a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, the body intrusted with that power, in its exercise, can not enact ordinances that are unreasonable, oppressive, or such as will create a monopoly.

Each member of a municipal corporation is required to share the burdens incident to such an organization; but, at the same time, all are entitled to share and participate equally in all benefits to be derived from such a government.

An ordinance, therefore, which would make an act done by one penal, and impose no penalty for the same act done, under like circumstances, upon another, could not be sanctioned or sustained, because it would be unjust and unreasonable. Dillon on Municipal Corporations, sec. 256.

In the case of the *City of Chicago* v. *Rumpff*, 45 Ill. 90, where the validity of an ordinance was called in question, which provided that all slaughtering for city consumption should be done at the establishment of a particular firm, and prohibited, under a penalty, slaughtering at any other place,

it was said: "All by-laws should be general in their operation, and should bear equally upon all the inhabitants of the municipality. When privileges are granted by an ordinance, they should be open to the enjoyment of all upon the same terms and conditions. That the common council had the right, under the large powers conferred by the charter, to so regulate the business of slaughtering animals as to prohibit its exercise, except in a particular portion of the city, leaving all persons free to erect slaughtering houses, and to exercise the calling at the place designated, can not be controverted. * * * * When that body have made the necessary regulations required for the health or comfort of the inhabitants, all persons inclined to pursue such an occupation should have the opportunity of conforming to such regulations, otherwise the ordinance would be unreasonable, and tend to oppression."

The same principle was clearly and forcibly enunciated in the case of *Mayor* v. *Thorne*, 7 Paige, 261, in the following language: "As all by-laws must be reasonable, the common council can not make a by-law which permits one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected, and to prohibit these defendants, whose buildings were destroyed by an incendiary, from rebuilding the same for the purpose of carrying on a manufacture which is permitted to others." See, also, Cooley's Constitutional Limitations, 200.

It will be observed. that the regulation, to enforce which this suit was instituted, prohibits the use and operating of slaughter houses which should be erected after the first day of January, 1872, while those that were erected prior to that time are left perfectly free to be operated as the owners thereof may desire.

If the health or comfort of the city required the prohibition of new slaughter houses within a designated part of the city,

the same reason would surely demand that old ones should be discontinued.

If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and, for that reason, void, but its direct tendency would be to create a monopoly, which the law will not tolerate.

The fact that certain persons were engaged in the business within the district designated in the ordinance at the time of its adoption, gave them no right to monopolize the business, nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period.

If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced.

A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation.

It is also urged, that it was incompetent for the legislature to confer upon the board of health legislative powers, and for that reason the regulation adopted by the board is void.

The board of health derives its power, whatever it may be, from an act of the legislature, approved March 9, 1867, "An act to amend the charter of the city of Chicago." Private Laws of 1867, page 754.

The first section of chapter four of the act provides, that the mayor of the city, with six other persons, to be appointed by the judges of the Superior Court, shall constitute the board of health of the city.

Section two, of the same chapter, is as follows:

"Said board of health may enact such by-laws, rules and regulations as it may deem advisable, in harmony with the provisions and objects of this act, and all acts, the object of which is to promote and preserve the health, safety and sanitary condition of the city, now existing or that may hereafter be passed, not inconsistent with the constitution or laws of this State, for the regulation of the action of said board, its officers and agents, in the discharge of its and their duties, and for the regulation of the citizens or public, and from time to time may alter, amend or annul the same."

Under this section the ordinance in question was adopted.

The legislative power, by the constitution of the State, is vested in the General Assembly. Ordinarily, this power can not be delegated. The right, however, of the legislature to empower municipal corporations to make by-laws and ordinances for the welfare and government of the inhabitants of the corporation, can not be questioned or denied. It may, however, be seriously questioned whether the legislature has the power to confer the law-making power upon a body not chosen or elected by the people, such as the board of health.

Where the legislature delegates authority to a municipal corporation to enact ordinances, these ordinances are enacted by a board of aldermen or common council, chosen or elected directly by the people of the municipality. Thus the people have a direct voice in making the laws by which they are to be governed. But if the legislature possess the power to provide that some judicial officer of the State may appoint, in a city, a body of men styled a board of health, and that board can be empowered to make ordinances for the government of the corporation, the people of that corporation may be deprived of self government. They will be governed by ordinances adopted by a body they had no voice in electing. This would be repugnant to the theory of our government.

Independent, however, of this question, which it is not necessary to decide in this case, we are of opinion that the

act of 1867 did not confer the power upon the board of health to adopt the ordinance, but, on the other hand, the common council elected by the people was intrusted with the power to adopt ordinances in relation to and upon the identical subject matter over which the board of health assumed to act.

Section twenty-four, of chapter five, of the act of 1867, which provided for the creation of the board of health, declares, that the common council shall have power and authority to regulate and control the slaughtering of all animals in the city, or within four miles thereof, intended for consumption or exposed for sale in the city, and to enforce, by additional ordinances, any regulation, contract or law heretofore made on the subject.

If it be true that the board of health was empowered, by section two of the act, to adopt the ordinance in question, then the legislature, by one and the same act, conferred upon two independent bodies, each having the same territorial jurisdiction, authority, by ordinance, to regulate and control the same thing. To impute an intention of this character to the legislature is so unreasonable and inconsistent, that we can not sanction it.

We can not understand how the power could, at the same time, exist in the two bodies to control, by ordinance, the same thing. The common council might adopt one regulation, and the board of health another, entirely different. Should that occur, which would the citizen be bound to obey? The regulation adopted by the one might be so inconsistent with that enacted by the other, that an observance of the one might be a violation of the other.

We can not, therefore, believe that it was the design of the General Assembly to confer legislative power over this subject both upon the common council and the board of health.

While, perhaps, the language used in section two might be regarded broad enough to confer the power upon the board of health, had section twenty-four been omitted from the act,

yet, as the power to legislate upon the subject is expressly given to the common council by the latter section, that general intent expressed in the former must give way to the latter. Sedgwick on Statutory and Constitutional Law, 360. We are, therefore, of opinion, that no power was conferred upon the board of health to adopt the ordinance in question.

The judgment will be reversed.

Judgment reversed.

PETER D. HAWVER.

v.

HENRIETTA HAWVER

1. SLANDER—*plea of justification, not conclusive evidence of malice.* The fact that a party, in an action for slander, fails to establish the truth of his plea of justification, by a preponderance of proof, is not of itself conclusive evidence of malice. It is sufficient if he believed it was true.

2. Such a defense can only be deemed proof of malice where it appears, from the whole case, that it was made with a malicious intent, and even then it is simply proof, but not conclusive proof.

3. WITNESSES—*husband and wife, when competent for and against each other.* The wife of a defendant is not a competent witness for him, in an action for slanderous words spoken by him of the plaintiff.

4. The husband of a plaintiff, in an action for slanderous words spoken of her, is a competent witness on her behalf.

APPEAL from the Circuit Court of McHenry county; the Hon. THEODORE D. MURPHY, Judge, presiding.

Mr. JOHN B. LYON, and Messrs. BENNETT & SALE, for the appellant.

Mr. B. N. SMITH, Mr. A. B. COON, and Mr. J. P. CHEEVER, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This action was brought for slander. Defendant accused plaintiff of being an unchaste woman. The trouble between them seems to have grown out of family difficulties. Plaintiff is the daughter-in-law of defendant. On the trial, she recovered a judgment, and defendant brings the case to this court on appeal.

Numerous errors have been assigned, but, as the judgment must be reversed for causes occurring on the trial, which are not of a conclusive character, we do not deem it proper, at this time, to discuss the merits of the case.

With the plea of not guilty, defendant filed a plea of justification, and, on the trial, offered some evidence to support it. The court, at the instance of plaintiff, instructed the jury that if defendant failed to establish the truth of the slanderous words set forth in the plea, by a fair preponderance of the evidence, and, at the time of filing the plea of justification, did not file it with a belief it was true, and that he could prove it, then the filing of such a plea is a repetition of the slander, and, consequently, conclusively proves malice on the part of defendant. This is stating the rule of law on this subject too broadly. The fact a party, in an action for slander, may fail to establish the truth of his plea of justification by a preponderance of proof, is not of itself conclusive evidence of malice. It is sufficient if he believed it was true, although he may have been unable to prove it, or that the evidence offered for that purpose was insufficient. Our statute on this subject is, in actions for slander or libel, an unproved allegation of the truth of the matter charged shall not be deemed proof of malice, unless the jury, on the whole case, find the defense was made with malicious intent. R. S. 1874, p. 992, section 3.

It will be perceived the instruction is much broader than the law will warrant. Evidence was offered by defendant to

sustain his plea. It may not have been sustained by a preponderance of the proof, but that fact is by no means conclusive evidence of malice. It is only where it shall appear, from the whole case, the defense was made with a malicious intent, it shall be deemed proof of malice. Even then it is not conclusive proof. It is simply proof of malice.

Under the facts of this case, the instruction was calculated to mislead the jury, and it was error in the court to give it.

There was no error in refusing to permit the wife of defendant to become a witness in his behalf. By the common law, she was not a competent witness on behalf of her husband, in such a case, and no statute of this State has removed the disability.

On the trial, the husband of plaintiff was admitted, against the objections of defendant, to become a witness on her behalf, and that ruling of the court is assigned for error.

The statutory provision is, no husband or wife shall be rendered competent witnesses for or against each other by the first section of the act of 1867, except where the litigation is concerning certain matters specified in the act, and among the objects enumerated is, where the litigation is concerning the "separate property of the wife." In such cases, the husband and wife may testify for or against each other in the same manner as other parties may under the act. R. S. 1874, p. 489, section 5.

This is an action for personal injuries done to the plaintiff. The right of action is alone in the wife. According to the definition given in the *Chicago, Burlington and Quincy Railroad* v. *Dunn*, 52 Ill. 260, this "right of action" is property, and, being the separate property of the wife, it is the exact case specified in the statute when the husband and wife may testify for and against each other the same as other parties.

Another exception is, in cases where the wife, if unmarried, would be plaintiff or defendant. That is the case here. Plaintiff is entitled to bring suit in her own name, just as though she was unmarried. The case of *Anderson* v. *Friend*,

71 Ill. ——, is an authority exactly in point, and is conclusive as to this construction of the statute. Hence, there was no error in admitting plaintiff's husband to become a witness on her behalf.

But for the error indicated, the judgment will be reversed and the cause remanded.

Judgment reversed.

JAMES CUDDY

v.

JAMES BROWN *et al.*

1. PROOF OF HEIRSHIP—*hearsay evidence admissible.* Hearsay testimony is admissible in questions of pedigree.

2. Where a party, owning real estate, died without issue, and it appeared that he originally came from a certain locality in Ireland, and that he had frequently spoken, amongst his friends, of his father and brothers, half brothers and a sister, naming some of them, still residing where he came from, and parties claiming to be heirs of the deceased proved that their father lived in the same locality; that it was common report in their family that they had an uncle in America of the same name of deceased; that their father had brothers and half brothers and a sister, and that the names of their father and his brothers, half brothers and sister corresponded with the names of those of deceased, so far as he had given their names, and that the name of their paternal grandfather corresponded with the name of the father of deceased, as given by himself; and it further appearing that the claimants were the sole surviving descendants of their father, and that all of his brothers, sisters and half brothers were dead, and had no descendants surviving: *Held*, this was sufficiently satisfactory evidence of the heirship of the claimants.

3. BARGAIN AND SALE OF LAND. A verbal contract made by the owner of land with the father of an infant eighteen months old, that he will give all his land to such infant in consideration of the surrender of such infant by the father to him, to be raised by him as his own child, does not constitute a bargain and sale of the land.

4. Such a state of facts might, under some circumstances, raise an equity which a court of equity, upon proper proofs, would carry out and enforce.

5. SAME—*possession.* If an infant, eighteen months of age, is taken into the family of the owner of land, under a verbal agreement between the father of the infant and the owner of the land, that the infant was to live with and be raised by such owner as his child, and that the owner was to give all his land to such child in consideration thereof, and such infant continued so to live with the owner until his death, this would not constitute possession of the land by such infant.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Mr. BENJ. OLIN, and Mr. EGBERT PHELPS, for the appellant.

Messrs. HILL & DIBBELL, for the appellees.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This record shows that one Michael Karney, at the January term, 1873, of the Will circuit court, exhibited his bill for the partition of certain lands situate in that county, between himself and the heirs of John Brown, deceased, to which his widow, Alice Brown, was made a defendant, and unknown heirs, residing in a foreign country, also made defendants, the deceased, Brown, dying without issue. It is also alleged that the widow has conveyed some interest in the land to James Cuddy, who is also made a defendant to the bill of complaint. It is further alleged, a parol partition of the lands was made between complainant and Brown, at the time of the purchase thereof, and that they were held, occupied and enjoyed according to this partition, up to the decease of Brown. The bill prayed that partition be made according to the parol agreement, and that the master in chancery execute a deed to complainant for his portion, as described in the bill of complaint.

The defendants were duly notified to appear, by service of subpœna and by publication, and the widow, Alice Brown, and James Cuddy, at the same January term, filed their joint and several answer to the bill of complaint, admitting the

parol partition and possession under it. Alice Brown admits making a conveyance to Cuddy for all the land partitioned to her husband, and that Cuddy is in possession thereof, and that the master in chancery convey the same to him, Cuddy.

At the January term, 1874, James Brown, John Brown and Jane Weldon filed their joint and several answer, in which they aver that they are the sole heirs at law of John Brown, deceased, and are entitled to one half of the lands, admitting the right of the widow to one half.

There were cross-bills, and answers to cross-bills, in one of which, filed by appellees, they deny any consideration for the alleged promise by the deceased Brown to appellant, and set up the Statute of Frauds and Perjuries, and ask for an account of rents and profits of the land, and that the land may be partitioned between them according to their respective rights and interests.

The cause was heard on the bill, answer and replications, and cross-bills and answers thereto, and replications and proofs.

The court found the parol partition to have been made as set forth in the original bill, and finds that Alice is the widow, and the defendants, James Brown, John Brown and Jane Weldon, are the heirs at law of John Brown, deceased, and that, at his death, they became seized in fee, each of an undivided one-sixth of his real estate, and entitled to partition thereof; that the widow, Alice, became seized of one-half his estate, and that she quit-claimed to James Cuddy, who is still seized in fee of her interest; that, for some years, Cuddy has had the rents, issues and profits of all of the real estate, and paid taxes and made improvements thereon; and it was decreed that the parol partition be confirmed and that partition be made of John Brown's interest, one-half to Cuddy and one-half to James and John Brown and Jane Weldon, and commissioners appointed to make partition, and the cause referred to the master in chancery to take an account of rents,

issues and profits, dismissing the cross-bill of James Cuddy with costs, and apportioning other costs.

To reverse this decree, Cuddy appeals, and makes the points: *First.* That the decree should have passed in his favor for the whole of the real estate of John Brown; and, *second*, the finding that appellees were the heirs at law of the deceased Brown, was against the law and the evidence.

These are the only points we have deemed it necessary to consider, for upon them the whole merits rest.

Upon the second point first: Is the fact sufficiently established, that appellees are the heirs at law of the deceased John Brown? This is a question of pedigree, in which hearsay testimony is admissible. Much evidence was introduced on the point. The principal witness was one of the appellees, James Brown, supplemented by the testimony of the widow of John Brown, who proves declarations of her deceased husband; Hugh Ward, an intimate friend of the deceased, from the same county in Ireland, Cavan; Michael Kaveny, an acquaintance of thirty years, and whom the deceased followed from the State of Massachusetts to this State, and Charles Kaveny, a nephew of Michael.

From this testimony, it appears there was living in the town of Lisagona, near Muff, in the vicinity of King's Court, county Cavan, Ireland, one Andrew Brown, who had four sons—John and Joseph by his first wife, Thomas and Andrew, and a daughter, Mary, by a second wife; that John left his native home more than forty years ago, and, by common report in the family, went first to England, where he married his wife, Alice, now his widow and a party to these proceedings, where he remained seven years or more, and then came to Canada, then to Massachusetts, then followed Michael Kaveny from that State to this, where he lived until his death; that the family in Ireland never heard from him until after his death; that his father and mother are dead; that the half brothers, Thomas and Andrew, and half sister, Mary, are dead, leaving no issue living, and that appellees, James and

John Brown and Jane Weldon, are the only surviving children of his full brother, Joseph, long since deceased.

The facts testified to by these witnesses all conspire to establish the identity of these appellees as the only surviving children of Joseph Brown, and that he was the full brother of the deceased John Brown. They raise, at any rate, a very strong presumption of that fact, and which is not rebutted by any circumstance developed in the case.

It is true, as urged, the name, John Brown, is not an uncommon designation, but it is not claimed here, there was any other John Brown in Cavan, who had a father named Andrew, and brothers and sisters bearing the names mentioned by the witnesses.

We think the proof of heirship of these appellees sufficiently convincing and satisfactory.

Upon the first point, appellant contends there was a regular bargain and sale of all the lands of the deceased, John Brown, to appellant, made by his father with Brown, the consideration being the surrender of appellant to him when eighteen months old, to live with him and be raised by him as his child.

No court, we believe, has ever held such facts establish a contract of bargain and sale. The most that may be predicated on them is, they may raise an equity which, under proper proofs, a court of equity will carry out and enforce. Such proofs have not been furnished in this case, and, from its nature, could not be furnished. No case has been cited, nor does any occur to us, where such a promise has been enforced. A parent may promise a son, if he will remain with him until he is thirty years of age, he shall have all his property. The son remains, is supported by his father, and at the same time rendering such services as he is able to render, and the father makes his last will and testament in favor of other children. Would it be claimed the son to whom the promise was made, could, in equity, make out of these facts such a contract as a court of equity would enforce? We appre-

hend not. The remedy would be assumpsit, for the value of the services rendered after he had reached the age of manhood, after deducting the cost of his maintenance. There is no just pretense here was a sale.

Appellant further contends, if the contract was in parol, he has shown sufficient to take the case out of the operation of the statute, in this, that he has shown a taking possession of the lands on the faith of the promise, and making lasting and valuable improvements thereon.

It can hardly be said, when appellant, then an infant eighteen months old, was taken by Brown into his family, after this alleged promise to appellant's father, that appellant, on entering Brown's household at that tender age, and under the circumstances proved, did so under the contract and with the intention then and there of taking possession of all his real estate, and that this possession continued up to the death of Brown, at which time appellant was twelve or thirteen years old. The idea is too absurd to need serious refutation. Appellant never, at any time during the lifetime of Brown, had any possession of these lands, or of any portion of them. He was on them as the child and servant of the owner, in a state of pupilage, having no right to exercise any will of his own over the property. Nor did he, during the lifetime of Brown, or at any other time, make any improvements upon the land, in the capacity or character of owner, present or prospective, or pay any taxes thereon, or enjoy the rents and profits, until after the death of Brown and the execution of the conveyance by the widow to him. By law, there being no child, or descendant of a child, the widow inherited one-half of the real estate of which her husband was seized in his lifetime, and was entitled to dower in the remaining half.

Her moiety thus inherited, she had a right to convey to appellant, and the circuit court measured and decreed to him his precise interest, and no more. None of the cases cited by appellant, decided by this and other courts, are in any respect like this.

Appellant did not control the farm after the death of Brown, and before 1872, when the deed was executed by the widow. The widow had complete control, paid the taxes and received the rents and profits, appellant being in no other position than that of a child or servant. He was only twelve years old at Brown's death.

We fail to find any evidence to establish the alleged contract as a binding contract, and the Statute of Frauds and Perjuries was well pleaded, and nothing is shown to take the case out of its operation.

It has been often held by this court, that applications for the specific performance of contracts for the sale of land, are addressed to the sound legal discretion of the court. And it has been often held, that where parol contracts are made on a valuable consideration, and the whole or a considerable part of the purchase money paid, possession taken, and valuable improvements made, all under the contract, and there be no hardship in it, such contracts will be enforced. This pretended contract lacks most of these elements. Appellant's services, from eighteen months old to the age of twelve, were no more valuable than the cost and expenses of his support and nurture. No possession was taken under the contract, and no valuable improvements made by him on the land under the contract. The pretences are unfounded, and no equity exists in appellant's favor, that we can discover.

Whatever error the circuit court may have committed, and we do not say there is any in regard to Mrs. Brown's interest in the land, whether of dower or homestead, appellant can not complain. It is for her to protect her own rights.

We are satisfied the decree of the circuit court, so far as appellant is concerned, was right, and it must be affirmed.

Decree affirmed.

HAMLIN, HALE & CO.

v.

ALBERT S. RACE.

1. MASTER AND SERVANT—*the latter should be respectful and obedient.* Where a party is employed by another, he must, in his intercourse with his employer, and those having control of his business, and with those doing business with such employer, abstain from all vulgarity and obscenity of language and conduct, and must be respectful and obedient to all reasonable commands of his employer, and those having control of his business.

2. A failure in any of these requirements by a salesman in a store, would be ground for discharging him before his term of employment expires.

3. ACTION *to recover installments—measure of damages.* On a contract for the payment of money in installments, assumpsit will usually lie to recover each installment as it falls due, without waiting for the last to mature.

4. But where a suit is brought on such a contract, the plaintiff can only recover the amount that was due at the time the suit was brought, although at the time of the trial all the installments may have matured.

5. Where a plaintiff has been employed by the defendant for one year, at a specified salary, payable in monthly installments, and before the year expired he was discharged, and afterwards, and before the end of his term, he brought suit, claiming that the contract was still in force, and that he was and had been ready and willing to perform, it was *held*, that he could only recover for the installments that had matured at the time the suit was brought, notwithstanding the term had expired before the cause was tried.

6. If, when he was discharged, he had terminated the agreement, and sued on the breach of the contract, and the cause was not tried until the term had expired, and it had then appeared that he had been unable to procure employment during the time, it may be that he could have recovered for all the damage he had sustained during the term by the breach of the contract.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. ALEXANDER S. BRADLEY, for the appellants.

Mr. DAVID S. PRIDE, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

Appellee was employed on the first of January, 1873, by Hamlin, Hale & Co., as a salesman in their store, for one year, at a salary of $1020, in monthly installments of $85. They, on the 23d of June following, dismissed him from their service, when they offered to pay him the amount that was due him to that date, which he declined to receive, and on the 6th of the following August brought this suit, to recover the balance for the full year, and on a trial in the court below recovered the full amount.

The declaration was in assumpsit, and contains a special count, with the usual common counts. The plea of the general issue was filed, and on the trial the defense relied on was, that appellee was discharged for good and sufficient cause. It is contended that appellee was insolent to his employers, and coarse and vulgar in his conduct, to such an extent as fully justified appellants in discharging him. This was a question of fact for the determination of the jury. All will at once concede that an employee must be respectful, and obedient to all reasonable commands of his employers, and those having control of the business in which he is employed; and no one will dispute that a person so employed, when engaged in the discharge of his business, and in his intercourse with customers and persons transacting business with the house and with his employers, and those having charge of the business, must be respectful, and must abstain from all vulgarity and obscenity of language and conduct. If wanting in any of these requirements, it would be grounds for discharging a salesman in a store from his employment.

But the question raised and pressed on our consideration is, as to the measure for the recovery of damages in the case, appellants contending that appellee was, in no event, on the pleadings in the case, entitled to recover more than was due at the time he brought his suit; that, under the pleadings, he can not recover for the monthly installments, or any of them,

which accrued after the suit was brought. On the other hand it is urged, that, as the year for which appellee was engaged had fully expired before the suit was tried, he was entitled to recover the unpaid balance of the $1020 which appellants had agreed to pay him.

Appellants contend, that, inasmuch as appellee did not, when he was discharged, terminate the contract or elect to so treat it, but, on the contrary, considered it as still subsisting, and was ready and willing to perform it in full, if required, he can only claim as damages in this suit the amount that would have been due him at the time the suit was commenced, had he continued in the employment of appellants; that if he desired to recover damages beyond that sum, he should, when discharged, have notified appellants that, as they had chosen to terminate the contract, he would treat it as rescinded, and hold them for all damages he had sustained by their terminating the agreement.

This precise question, in the shape now presented to the court, has never been passed upon by us, although analogous questions may have been.

The law is well settled, that, on a contract for the payment of money by installments, assumpsit will usually lie to recover each installment as it falls due, without waiting for the last to mature. 1 Chit. Pl. 116. Here was a sum of money to be paid by monthly installments; and there can be no doubt that appellee, at the end of each month, could have sued for and recovered for the installment which accrued and became due at that time. But it is equally well settled that a party can not, when he sues for an installment which is due, recover for installments not due when the suit was brought. And where the declaration showed, by its averments, that a recovery of installments not due was claimed, and there was a general verdict, the courts considered it ground for arresting the judgment, because the plaintiff was not entitled to recover for the portion claimed in the declaration, which was not due at the institution of the suit. If it were necessary

to cite authorities on so simple and well settled a proposition, we might refer to note 1, to the case of *Hambleton* v. *Veere*, 2 Saund. R. 171 a and b, and the cases therein cited; *Gordan* v. *Kennedy*, 2 Binn. 287, and the authorities there referred to by the court.

We had supposed no rule was more inflexible or better established than that a plaintiff can not recover for money not due at the institution of the suit. *Gordan* v. *Kennedy, supra;* 1 Chit. Pl. 372; *Cunningham* v. *Morrell*, 20 J. R. 203; *McLure* v. *Rush*, 9 Dana, 64; *Allen* v. *Sanders*, 7 B. Monr. 593; *Kettle* v. *Harvey*, 21 Verm. 301; *Lord* v. *Belknap*, 1 Cush. 279; and *Tompkins* v. *Elliott*, 5 Wend. 496. If this rule could be seriously questioned, other cases could be referred to as establishing the rule; but, to our minds, it requires no authority, as it is based upon principles obviously just.

If, then, a party can not sue for and recover a debt or claim before it is due, why should he do, indirectly, the same thing by suing for a small part when due, and recovering a greater and more substantial part accruing after the suit has been brought? The law never permits that to be done indirectly which it prohibits from being done directly. To permit the recovery of the sums falling due after suit brought, would be an evasion of the rule that the cause of action must be complete when suit is brought. It would be without analogy to any rule of law which now occurs to us. In the case of *Crabtree* v. *Hagenbaugh*, 25 Ill. 233, it was said, that where a party sued for the breach of an independent portion of a contract, he might recover for its breach, though his recovery would be limited to the damages sustained at the time the suit was commenced. We have no hesitation in holding that appellee was only entitled to recover for the amount that would have been due had he continued in the service of appellants at the time the suit was instituted, and the court below erred in admitting evidence of the installments that would have matured afterwards.

Suppose that, after the suit had been brought, appellants

had demanded of appellee the fulfillment of his part of the contract, and he had refused them, what would have been the measure of damages? Obviously not more than the wages which had accrued up to the time of the demand. Then why permit a recovery beyond the damages sustained when suit was brought? Or, suppose a trial had been had ten or fifteen days after suit was brought, and the same damages as were recovered in this case had been allowed, and after the recovery appellants had demanded of appellee to go on and perform his contract, and he had refused, would appellants have been compelled to sue and recover the amount back? Yet such a thing might occur, when the plaintiff is still insisting upon being allowed to perform his part of the agreement. Such a state of things would be an anomaly. If he insists upon going on with his part of the agreement, he should sue when each installment occurs, or wait till the end of the time, and sue for the whole.

At common law it was a ground of arrest to claim such installments in the declaration; so it is a ground requiring the granting of a new trial, to permit proof of the same, unless it is apparent that it was not considered by the jury, and was excluded from the verdict. But in this case it is manifest that the installments which were not due when appellee sued, entered into and formed much the greater portion of the finding.

Had appellee, when discharged, terminated the agreement, and then sued on the breach of the contract, it may be that a different rule might have prevailed. Then, the cause of action would have been the breach, and it would have been averred that the contract was at an end, and that plaintiff had been thrown out of employment, whereby he had sustained damage, etc. In such a case, it may be that he could have recovered for all the damage he sustained during the year by the breach of the contract, if the trial was had after its expiration. In such a case, the damage would have continued had he been unable to procure employment during the time; but

the suit here is not for a breach of the entire contract, and abandoned by appellee, but, on the contrary, he avers that he insisted upon its performance during the remainder of the year.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

EBEN L. CLEMENT

v.

HANNAH NEWTON *et al.*

1. MECHANIC'S LIEN—*can not be enforced after taking note of owner of building, without returning note.* The fact that a party, seeking to enforce a mechanic's lien, took the note of the person for whom the work was done, for the work, and traded it off, and the note was not produced on the trial, and offered to be surrendered, nor any excuse shown for its non-production, would warrant a judgment for the defendant.

2. Where the petitioner, in a proceeding to enforce a mechanic's lien, testified that he had taken a note for his work, and traded it to a third party, a motion made to set aside a judgment rendered in favor of the defendant, based upon the affidavit of such third party that he had never received such note from the petitioner, and that he held the beneficial interest in the claim in suit, the attorney of said third party having, on the trial, testified to the same fact, was properly overruled.

3. CONTINUANCE—*on ground of surprise.* Where the petitioner, in a proceeding to enforce a mechanic's lien, testified that he had taken a note for his work, and turned it over to a third party, a motion by the attorney of petitioner for a continuance, on the ground of surprise by such testimony, was overruled: *Held*, the overruling of the motion was not error.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. RICHARD S. TUTHILL, for the appellant.

Messrs. MONROE & LEDDY, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a petition to enforce a mechanic's lien. The court below, on trial without a jury, found for the defendants. The petitioner appealed.

The petition alleges that, on March 19, 1873, the petitioner entered into a contract with Hannah S. Newton to paint the dwelling house of said Hannah, known as No. 159 Wahpanseh avenue, in the city of Chicago, for $310; that, afterward, there were three deeds of trust on the property, made by Hannah S. Newton to secure the payment of three several promissory notes. The answers admit the making of the trust deeds.

The petitioner testified that he never made any contract with Hannah S. Newton, but that he made a contract with George H. Newton, her husband, to paint two houses in Wahpanseh avenue; that they were two houses under one roof, and he thought the numbers of them were 167 and 165; that they had two numbers; that the east house was occupied by George H. Newton before the petitioner got through painting.

There was a variance here, between the petition and proof, as to the description of the houses.

The evidence in the case was very slight from which there could be any inference of agency on the part of George H. Newton, from his wife, in making the contract.

The work seems to have been done for George H. Newton, and upon his personal credit.

The petitioner testifies that he took the note of George H. Newton for the work, and sold it and indorsed it over to one Armstrong for $300, and that was the last he had ever heard of it.

The note was not produced and offered to be surrendered at the trial, nor any excuse shown for its non-production. This of itself would warrant the judgment for the defendants.

Motions were made by the counsel for the petitioner to

amend the petition as to the description of the house; to continue the cause, for reason of surprise by the testimony of Clement as to the note, and after the judgment, to set it aside, the latter motion being based upon the affidavit of Armstrong that he never received a note, as testified to by petitioner, Clement, on the trial, and that he, Armstrong, held the beneficial interest in the claim in suit.

The overruling of these motions is assigned for error.

We do not think that, under the circumstances, the decision of the court in respect to the motions constitutes any sufficient ground of error.

There was, in the case, the testimony of the attorney of Armstrong, who attended to the management of the business in that respect, that Armstrong did not receive any note from Clement. The testimony of Armstrong would have been but cumulative upon the point, and no way conclusive in its character.

The judgment will be affirmed.

Judgment affirmed.

NELSON MONROE

v.

JOSEPH W. CHALDECK.

1. TENDER—*plea of, admits the amount named therein to be due.* Where a defendant pleads a tender of a certain amount to the plaintiff, he thereby admits that that amount is due, and he is estopped from denying it.

2. And the plaintiff has the right to sign judgment on a plea of tender, to the amount alleged to have been tendered, if it has not been paid into court.

3. SAME—*practice in case of signing judgment.* The correct practice, where a plaintiff elects to take the amount alleged to have been tendered, is, if the money is brought into court, to order it to be paid over to the plaintiff, and render judgment against him for costs; but if the money is not brought into court, the judgment should be against the defendant for the amount of the tender, and costs.

APPEAL from the Circuit Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

Mr. JAMES LEDDY, for the appellant.

Mr. JOHN LYLE KING, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of covenant, brought by appellee, against appellant, upon a lease, to recover $150 which had been paid in advance for the rent of the premises, and also to recover damages for the failure of appellant to put appellee in the possession of the leased premises.

To the declaration, appellant interposed three pleas, upon which issue was taken: first, *non est factum;* second, payment; third, tender of $150.

The plea of tender, in substance, alleges the breach of covenant first above assigned in said declaration so far as the same relates to the payment by plaintiff to the defendant of the sum of $150, that the plaintiff ought not to recover any more or greater damages, because, before the commencement of the suit, defendant was willing, and then and there tendered and offered plaintiff the said sum of $150, which the plaintiff refused to receive; that the defendant has always, from the time last aforesaid until now, been ready to pay, and still is ready to pay, to the plaintiff the sum last aforesaid, and he now brings the same here into court, ready to be paid to the plaintiff, if he will accept the same, etc.

On the trial, the lease was read in evidence, without objection, and it was proven that $150 had been paid to appellant as rent upon the lease; that the premises embraced in the lease were held and occupied by a tenant of appellant, in consequence of which appellee did not acquire the possession or use of the premises.

Appellee then filed a written waiver of damages, in the words following:

"Plaintiff now, in open court, waives and releases any other damages claimed in the declaration than as to the sum of $150, alleged by defendant, in his third plea, to be tendered and brought into court, but as to said sum of $150, plaintiff accepts, and asks judgment for said amount."

The defendant having offered no evidence whatever, the court rendered judgment against him for the sum of $150 and costs.

To reverse the judgment of the circuit court, appellant insists: first, that the judgment upon the plea of tender was unauthorized, and second, in no event could a judgment for costs be rendered against him.

It is not claimed that any portion of the money recovered by appellant was repaid to appellee, nor is it pretended that the lease in evidence was not signed and sealed by appellant. The only controversy between the parties seems to have been over the effect of the plea of tender, and the judgment of the court upon it, and this is the only point we deem it necessary to consider.

Whether the appellee could recover upon the lease, independent of the plea of tender, is a question that does not arise upon the record, and will not be considered.

In Chitty on Contracts, page 793, the author says, "A tender admits the contract and facts specially stated in the declaration, if the plea be applied to that part of the declaration." Again, on page 802, it is said, "Upon a plea of tender, the defendant expressly admits the sum tendered to be due, and brings it into court to be paid to the plaintiff. Payment may be pleaded to a part of the plaintiff's claim, and a tender as to the residue, and this without showing that the payment was made before the tender, or any other reason for tendering a portion only of the demand."

In the case of *Cilley* v. *Hawkins*, 48 Ill. 308, in an action to recover unliquidated damages, where a plea of tender could not be interposed, it was, however, held that a plea of tender

was an admission that the damages amounted to the sum tendered.

In *Sweetland* v. *Tuthill*, 54 Ill. 215, where a tender was made for a greater sum than was actually due, it was said, "by tendering the money, appellee admitted the sum was due appellant, and it was error to order any portion of the sum refunded."

The appellant states, in his plea of tender, that, as to the $150, after the making of the lease, he was ready and willing, and offered to pay the same to appellee, and still is ready and willing to pay the same, with an averment that he brings the money into court for appellee, when he is willing to accept it.

Under the authorities cited, we can not regard this admission otherwise than as conclusive upon appellant. He is estopped by the record from denying that he is indebted to appellee in the sum named in his plea.

The very object of a tender is to enable the plaintiff in the action, if he sees proper, to accept the amount conceded by a defendant to be due, and thus put an end to the litigation. This object could not be attained if the defendant was not bound to abide by his tender.

But it is said it was error for the court to enter judgment for the amount tendered by the plea, and costs. This position might be regarded with some force, had it appeared the amount named in the plea was actually offered appellee before suit was instituted, and this followed up by bringing the money into court, subject to the order of the court. The correct practice, had this been done, would have required the court to have ordered the money tendered paid over to appellee, and rendered judgment against him for the costs; but, as the evidence did not show a tender before suit brought, and the money was not brought into court, under the admission in the plea, the court could do no less than render judgment for the amount admitted by the plea to be due, and for costs.

The rule laid down in Chitty on Contracts, page 803, is, the plaintiff may sign judgment on the plea of tender, and

to the extent to which it applies, if the sum alleged to have been tendered be not paid into court.

This rule was adhered to by the circuit court, and the practice adopted meets our approval.

The judgment will therefore be affirmed.

Judgment affirmed.

MARIA L. WOLCOTT *et al.*

v.

GEORGE B. HEATH.

1. EVIDENCE—*proof book account.* Where a witness testified, without objection, in regard to items of an account, many of which he personally knew to be correct at the time they were entered in the books of his employer, years before, but could not remember as to dates and amounts, except by reference to the books, it was error to instruct the jury to disregard all his testimony based upon the books, and upon such matters as he stated he only knew from the books.

2. INSTRUCTION—*should not assume facts.* It is error to instruct the jury that if they believe, from the evidence of a particular witness, that all his knowledge of a fact testified about by him is derived from the books of the party calling him, and if they find that the testimony of such witness is all the evidence on that subject, then there is no evidence before them as to that fact.

3. TIME CONTRACTS—*not unlawful.* Time contracts, made in good faith, for the future delivery of grain or other commodity, are not prohibited, either by the common law or statute.

4. CONTRACTS AGAINST PUBLIC POLICY—*repudiation.* If a party repudiates a contract on the ground that it is unlawful, he must repudiate all contracts of the like kind with the same party. He can not claim the benefit of such as are profitable and repudiate those that are unprofitable.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. WOOD & LOOMIS, for the plaintiffs in error.

Messrs. BLADES, KAY & EVANS, for the defendant in error.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

Although this action was commenced in replevin, by stipulation the controversy has exclusive relation to the state of the accounts between the parties. It was agreed, if it should be found, on the trial, that plaintiff was indebted to defendants in a sum exceeding $501.85, judgment should be rendered in their favor, and against plaintiff, for any sum in excess of that amount; otherwise, judgment was to be for plaintiff. The jury found the issues for plaintiff, and defendants bring the cause to this court on error.

The verdict in this case can not be regarded as settling any of the controverted facts, on account of the erroneous instructions given on behalf of plaintiff. All of them are, more or less, faulty, and were calculated to mislead the jury on the issues involved.

The court directed that all the testimony of Wolcott based upon the books only, and upon such matters concerning which he states he only knew from the books, should be disregarded. Under the circumstances proven, the charge was erroneous. The testimony of the witness had been given as to the controverted facts without objection. Many of the items on the books to which his testimony had reference he knew, of his personal knowledge, were correct at the time the entries were made, but, as to the dates and amounts of the several transactions which had transpired years before, although he still remembered distinctly the transactions, it was not possible for him to state except from the daily entries upon the books. Defendants were commission merchants in Chicago, and the proof is, they did an immense amount of business each year, and with a very great number of customers. The transactions with plaintiff were numerous, and extended through a series of years. A witness who would state that he could tell, from his memory, unassisted by books or other memoranda, the exact amount of each kind of grain a firm doing

such a business would or did purchase and sell in any number of years, and at what prices to each customer, would doubtless be considered unworthy of belief. Constant changes were taking place in the market prices of the various kinds of grain in which they were dealing, within brief periods, and perhaps every day. Any one who would claim to remember all these changes, so as to testify to them in after years, would hardly be credited as a candid witness. Books in which daily entries of such transactions are made, are legitimate sources of information as to amounts, dates and current prices, from which the witness may, with propriety, refresh his recollection, and to exclude testimony derived from that source is to cut off the only channel of information as to important facts.

The jury were also instructed, if they should find, from the testimony of Wolcott, that all he knew about the price of oats and the amount of loss upon them, he only knew from the books, and if they found that was all the evidence as to the oats, then they had no evidence before them as to the amounts of the purchases and sales of oats, nor of any loss upon them, and as to that matter they should find for plaintiff. A like charge was given as to purchases, sales and losses on corn.

These instructions are subject to the same criticism as the first, but are erroneous for another reason. It is assumed, if all the information Wolcott had as to the purchases and sales of corn and oats, and losses thereon, was derived from the books, the jury had no other evidence on the questions before them. Whether that was so, was a question for the jury, upon which the court could not, with propriety, express any opinion; but the assumption has no foundation in fact. There was evidence in the case, independent of the testimony of Wolcott, as to the purchases and sales of both corn and oats, and losses thereon, and the jury ought to have been left free to pass upon it.

The real controversy between the parties was as to profits

and losses on the purchases and sales of grain. Plaintiff insists he never had any dealings with defendants but grain transactions. His place of business was in the country, and defendants were his commission merchants in Chicago. He shipped grain to them, which they sold on his account for a commission. At plaintiff's request, defendants bought and sold grain for him on the board of trade in Chicago. When profits were realized, plaintiff was credited with them, and when losses occurred, he was charged with them. All the disputed items between the parties grew out of the transactions on the board of trade. So far as grain was shipped to defendants from the country, and by them sold on account of plaintiff, there does not seem to be any controversy. These transactions continued through a series of years, during all which time defendants rendered plaintiff monthly detailed statements of the accounts, with which he generally expressed himself well pleased.

Plaintiff now insists the alleged purchases and sales made by defendants, for him, on the board of trade, were all fictitious; that no grain was in fact bought or sold, and hence all the contracts in relation thereto were void, under the common law, as being inhibited by a sound public policy. Whatever these contracts were, they were not made between plaintiff and defendants, but by defendants, as agents for plaintiff, with third parties, on the board of trade. The indebtedness to defendants consists of advances made by them in those transactions for plaintiff, at his request and upon his express promise to reimburse them. We will not, at this time, discuss the question whether the agents would be debarred from recovering from their principal for advances made at his request, if it be conceded the enterprises in which the principal was engaged were so far unlawful that contracts in regard thereto could not be enforced. The evidence in this record is by no means conclusive that the contracts for grain, made by defendants for plaintiff, were unlawful. They were made in the regular course of business, and, for anything that

appears in this record, they could have been enforced in the courts. It is true, they were time contracts—that is, the seller had all of the month in which to deliver the grain; but the testimony of Wolcott is, they were *bona fide* contracts for the actual purchase of the grain. The only option the seller had was as to the time of delivery. The obligation was, to deliver the grain at all events, but it was the seller's privilege or option to deliver it at any time before the closing of business on the last day of the month. Time contracts, made in good faith, for the future delivery of grain or any other commodity, are not prohibited by the common law nor any statute of this State, nor by any policy beneficial to the public welfare. Such a restraint would limit commercial transactions to such a degree as could not but be prejudicial to the best interests of trade. Our present statute was not in force when these dealings were had; consequently the rights of the parties are not affected by it. What the law prohibits, and what is deemed detrimental to the public interests, is, speculations in differences in market values, called, perhaps, in the peculiar language of the dealers, "puts" and "calls," which simply means a privilege to deliver or receive the grain, or not, at the seller or buyer's option. It is against such fictitious, gambling transactions we apprehend the penalties of the law are leveled.

But to find the present verdict, the jury must have given plaintiff credit for all the profits realized on the advantageous contracts and allowed defendants nothing where losses occurred for their advances made for him. This they were not authorized to do. If the contracts made by defendants, on behalf of plaintiff, were such as plaintiff could repudiate, because unlawful, he must repudiate all of them, or none. He could not be permitted, in any event, to appropriate to himself the profits of such contracts as were to his advantage, and disavow all others.

The judgment will be reversed and the cause remanded.

Judgment reversed.

WILLIAM SKELLY
v.
JAMES BOLAND.

1. NEW TRIAL—*newly discovered evidence.* It is not error to refuse a new trial on the ground of newly discovered evidence, where the evidence is merely cumulative.

2. PRACTICE—*remarks of the court.* It is not proper for a court to make remarks, in the hearing of the jury, calculated to influence their finding.

3. Where a plaintiff had closed his case, and had shown a right to recover, the defendant moved for a non-suit, which the court denied, and remarked, in the hearing of the jury, that, upon the evidence then in, the plaintiff would be entitled to recover, unless the defendant made a defense: *Held*, that any interference by the court, by remark or otherwise, within the hearing of the jury, except by way of instructions, is improper, but this court will not reverse for that reason, when it is apparent that the remark did not prejudice the defendant's case.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. MONROE & LEDDY, for the appellant.

Mr. F. W. YOUNG, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was assumpsit, in the Superior Court of Cook county, by James Boland against William Skelly and John Gwynn, sued as partners, under the firm name of Skelly, Gwynn & Co., to recover for services as clerk to that firm, at the rate of one thousand dollars per annum, by special agreement.

Gwynn defaulted, and Skelly went to trial on the general issue. The jury found for the plaintiff, and assessed his damages, on which the court rendered a judgment, having denied defendant's motion for a new trial. Skelly appealed, making the point that the court made improper remarks on the trial of the cause, in the hearing of the jury, by which his case was prejudiced, and that there was error in refusing a

new trial, insisting the weight of evidence is against the verdict. No point is made on the instructions.

The only contest between the parties was this: Were these services rendered by appellee as a clerk in the concern, or as a partner? The defendant, Skelly, contended the plaintiff was a partner, and in that capacity or character rendered the services. Much testimony was heard on this point, conflicting, of course—appellant being his own principal witness, whilst appellee testified for himself. There were other witnesses on both sides. On the part of appellee, the defaulted defendant and partner was examined, and he testified, that he and appellant had tried to induce appellee to become a partner with them, but, failing in this, they agreed to hire appellee and give him a salary, on account of his acquaintance and influence with vessel men.

Appellee did make the experiment, for a few days, of acting as a partner, and gave the partnership the benefit of his name in one or two transactions, but the great preponderance of the evidence is, that he never was a partner, but a clerk merely, and as such entitled to wages.

When the plaintiff rested his case, the defendant moved for a verdict, which motion the court denied, remarking, in the hearing of the jury: "As it now stands, upon the evidence now in, the plaintiff has made out a perfect case, and is entitled to a verdict, unless the defendant makes a defense." The defendant excepted to this, and we have considered the point; and whilst expressing our disapprobation of any interference of the court, by remarks or otherwise, within the hearing of the jury, unless they be in the form of instructions, the remark here excepted to, in the view of the testimony then before the jury, could not have prejudiced the defendant's case, and we would not, therefore, set aside the verdict.

There was no error in refusing a new trial on the ground of newly discovered evidence. The evidence was not of a conclusive character—it was cumulative merely.

Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

THOMAS S. DOBBINS *et al.*

v.

HENRY O. HIGGINS *et al.*

1. CONTINUANCE. Where the declaration contained only the common counts, and there was a stipulation between the parties that the plaintiff might introduce any evidence that would be admissible under any special count that could be drawn on the contract, and the plaintiff amended his account by adding an item thereto, for which a special count had been drawn: *Held*, that, under the stipulation, evidence as to such item could have been introduced without amending the account, and it was not error to refuse a continuance on account of such amendment.

2. CONTRACT—*when may be abandoned—measure of damages.* Where, by the terms of a contract, parties performing labor under it are to be paid at the end of each month, for the labor performed to that time, and they are not paid at the stipulated time, and are, by reason thereof, compelled to abandon the work, they have the right to do so, and are entitled to recover for the work done and not paid for, *pro tanto*, at the contract price.

3. Where a contract is made, by which a party undertakes to do the grading on a railroad, and gives a bond for the faithful performance of his part of the contract, he is entitled to receive the compensation provided for in the contract at the times and in the manner therein provided for, and those with whom the contract was entered into have no right to withhold any part thereof for the purpose of paying the hands or sub-contractors on such work, and if they do so, the contractor has the right to abandon the contract and sue for and recover compensation for damages.

4. In such case, it seems that the bond given by the contractor for the performance of his contract is relied on, instead of inserting a clause in the contract authorizing the payment of the hands and sub-contractors, and the deduction of such payments from the sum to be paid the contractor.

5. INTEREST *on money payable in installments.* Where, by the terms of a written contract, payments become due on a certain day in each month, it is proper to allow interest on such sum as may be due on the specified day, from that time until paid.

APPEAL from the Superior Court of Cook county; the Hon. JOHN A. JAMESON, Judge, presiding.

Messrs. SAWIN & JONES, for the appellants.

Messrs. MONROE, BISBEE & BALL, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

We perceive no error in refusing a continuance by the court below. It was stipulated by the parties that plaintiff might introduce any evidence that would be admissible under any special count that could be drawn on the contract, and defendants might introduce any evidence that would be admissible under well drawn special pleas to the action. Suppose that there had been a special count, claiming extra pay on account of hard-pan excavation, would it not have apprised defendants of such a claim as fully as adding a charge for that item; and defendants had stipulated as to the introduction of evidence, as though the count was in the declaration. It was, in fact, more than plaintiff was required to do, when he inserted the item, as, by the terms of the stipulation, he could have introduced the evidence without amending his account.

We fail to find that any portion of this item was embraced in the verdict. Appellees say this item was abandoned on the trial, but we fail to find it noticed in the abstract, nor do counsel refer us to the portion of the record where it may be found, and we have not consumed the time requisite to search the voluminous record in the case.

That there was a breach of contract on the part of appellants, can not be contested. By their contract, they were bound to pay on estimates at the end of each month. But they neglected or refused to pay for the work done in October, for twelve days or more, and a portion of that time after appellees had given them notice that a further failure to pay would be treated as a rescission, and they would be compelled to abandon the work, which the evidence shows they did, not from choice, but from necessity. They show they could not proceed, for the want of means, but could have

proceeded to the completion of their part of the contract, had appellants paid them this money. Nor do they show a sufficient excuse for refusing to make payment. Their contract was to pay appellees, and not their hands, sub-contractors or their hands. They had taken a bond from appellee, to secure the faithful performance of their part of the contract. They seem to have relied upon this bond, instead of inserting a clause in the contract authorizing them to make such payments and deduct the amount from the sum they were to pay appellees. Appellants had no right to superadd new terms and conditions to the agreement, but they were bound to perform it as they made and executed it. This was the duty of both parties. Having failed to make payment for the work performed in October on the contract, appellees had the unquestioned right to abandon the contract and to sue for and recover compensation for damages.

The correct measure of damages was adopted by the instructions given for appellees. They informed the jury that they had a right to recover for the work done and not paid for, *pro tanto*, at the contract price. This has been repeatedly held by this court to be the true rule in this character of cases.

It is objected that there was error in allowing a recovery for interest on the amount withheld by appellants.

The second section of the Interest law, R. S. 1874, p. 614, provides that interest at the rate of six per cent shall be allowed on money after it shall become due, on any bond, bill, promissory note or other instrument in writing. Now, this money became due and payable, under this agreement, on the 3d day of November, 1872, under and by the terms of this contract, and hence it falls within the provision of the statute.

It remains to determine whether the court below erred in rejecting appellants' set-off for money paid to appellees' sub-contractors and the pay-rolls of their men. They claim that appellees authorized them to make such payments. This they

deny, and in it they are corroborated by Col. Hough, who testified they were not so authorized. On the other hand, there are three witnesses who think that such authority was given, but they are not positive and definite as to what was said. We think the evidence for appellees on this question is clearer and more satisfactory than that of the other witnesses.

We do not regard the evidence offered by appellants as preponderating over that of appellees. At any rate, it was for the jury to determine, after weighing it in the light of all the surrounding circumstances, and they having acted upon it, we are not disposed to disturb the conclusion they have reached.

We perceive no error in this record which requires a reversal, and the judgment must be affirmed.

Judgment affirmed.

James McMillen

v.

Joseph Lee.

1. Parent and child—*liability of parent to pay for necessaries furnished his infant child by a third person.* Either an express promise, or circumstances from which a promise by the father can be inferred, is essential, in all cases, to bind him for necessaries furnished his infant child by a third person.

2. Where the father and mother separate by mutual consent, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and is bound by her contracts for necessaries for them.

3. Instructions. In a suit brought by a physician against the father, for medical attendance on his infant child, it is wrong to instruct the jury that the father is liable, if the services rendered were necessary, without reference to any promise, express or implied. But if the evidence was such as to leave no doubt that there was an implied promise, and the jury were distinctly instructed, on behalf of the defendant, that there must

have been a promise, express or implied, the defect in the instruction would do the defendant no such harm as to require a reversal of the judgment.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. PORTER & MOSHER, for the appellant.

Messrs. STEWART & PHELPS, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action to recover for medical services of the value of $57, rendered to a child of the wife of the defendant, the mother, with the child, at the time, living separate and apart from her husband.

The plaintiff recovered in the court below.

The only question made is, whether, under the circumstances, the husband of the mother of the child is liable to the physician for the services thus rendered. That the services were necessary for the child, is not disputed. They were not rendered upon employment by the defendant, nor was there any express promise on his part to pay for them. The evidence shows that, at the time, the mother, with the child, was living with one Allard, as his house-keeper; that he was to pay her so much a week, and keep the child as part of his family; that Allard called in the plaintiff, saying that a woman there had a very sick child, which she wanted plaintiff to come in and see. The precise manner and reason of the husband and wife becoming separated and living thus apart, whether by mutual arrangement or not, does not expressly appear. Defendant testified that the first separation, the one in question, was made on account of this child; that the wife said it was not defendant's child, and that she would take it and keep it. It appears that they subsequently lived together again, some year and a half, and again separated. We think the testimony will admit of the inference that the

living apart of the parties as they did, was by mutual consent.

In that case, we consider the principle as laid down in 1 Parsons on Contracts, 307, would apply here: that, where the father and mother separate, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and is bound by her contract for necessaries for them.

The evidence supports the verdict.

Objection is taken to the giving of this instruction for the plaintiff:

"The court instructs the jury that the law does not require that there should be an express promise by a father to pay for medical services rendered to his child, in order that he should be made liable therefor, but that, if such services were necessary for the child, or that are rendered under circumstances sufficient to raise an implied promise, then the law implies a promise on the part of the father, on account of his relationship, to pay for the same; and if, from the evidence in this case, the jury believe that the services rendered by plaintiff were necessary for the child doctored, which was a child born of defendant's wife during the time they were legal husband and wife, and living, before and after its birth, with defendant, then the jury will find for the plaintiff, and assess his damages at the sum the plaintiff's services have been shown to be worth."

We recognize the law to be, as claimed by the appellant, that either an express promise, or circumstances from which a promise by the father can be inferred, are necessary, in all cases, to bind the parent for necessaries furnished his infant child by a third person. *Hunt* v. *Thompson*, 3 Scam. 179; *Kelley* v. *Davis*, 49 N. H. 187.

The instruction was wrong, in its latter branch, in asserting a liability if the services were necessary, without reference to any promise, express or implied, to pay for them.

But there was so little room for question, that, under the circumstances, there was an implied promise, and the jury having been distinctly instructed, on behalf of the defendant, that there must have been a promise, express or implied, we can not think the instruction did the defendant any harm, and are of opinion that the defect in the instruction was not, under the circumstances, so material as to require a reversal of the judgment, and it will be affirmed.

Judgment affirmed.

HERMAN D. STEARNS *et al.*

v.

SAMUEL H. SWEET *et al.*

1. CONSTRUCTION—*of the payment of interest "to" a day.* An indorsement of the payment of interest on a promissory note to the 26th day of July, 1871, will not embrace the interest accruing on that day, but will be understood as including the interest for the time which was completed when that day commenced.

2. SAME—*words in popular sense in contracts.* In construing written contracts and writings of parties, the words used will be taken in their ordinary and popular sense.

3. EXTENSION OF TIME OF PAYMENT—*evidence.* The payment of interest on a note up to the day it is paid at a greater rate of interest than the party is legally bound to pay, without any other proof, does not show an agreement to extend the time of payment so as to release a surety.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

This was an action of assumpsit, by Samuel H. Sweet, Wesley Dempster and Charles Hutchinson, partners, against Samuel C. Stearns, Herman D. Stearns, Frank Bush and Edward Aiken, upon five promissory notes.

Samuel C. Stearns, the principal, not being found, a trial was had as against the sureties, before the court, without a

jury, resulting in a judgment in favor of the plaintiffs for $1000. The securities appealed.

Mr. C. B. GARNSEY, for the appellants.

Messrs. HILL & DIBBELL, for the appellees.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Assumpsit was brought by appellees against appellants, and another, on five promissory notes executed by the latter to the former, bearing date April 5, 1870, and payable, respectively, in four, six, eight, ten and twelve months from date, for different amounts, the precise statement of which is unnecessary for the solution of the question before us. The notes, by their terms, do not require the payment of interest.

Appellants pleaded first, non assumpsit, and secondly, that they were sureties only; that appellees were informed of that fact, and that they extended the time of payment of the notes for good consideration paid them by the principal, without the knowledge or consent of appellants. Issue was joined on the pleas, and trial had, resulting in a judgment in favor of appellees for $1000.

The only question is, does the evidence show that appellees entered into a contract with the principal in the notes, extending the time of payment, without the knowledge or consent of appellants?

The following indorsement appears on each of the notes: "Interest paid on the within note to July 26, '71, at the rate of ten per cent per annum;" and appellants each testifies that this was done without his knowledge or consent. Samuel C. Stearns testifies that he was the principal maker of the notes, and the appellants were his sureties; that the interest was paid at the time the indorsements on the notes were made, which he thinks was on the 26th day of July, 1871.

There is no other evidence tending to show a contract for an extension of time.

We do not understand the counsel as contending that the payment of interest by the principal for time past, without the knowledge or consent of the surety, will release the surety; but merely that the payment by the principal, and acceptance by appellees, of interest on the notes to July 26, '71, created a contract whereby the time of payment of the notes was extended until the last moment of that day. Taking the word "to" in its plain, ordinary and popular sense, as we are, in this instance, required to construe it, (Chitty on Contracts, 11th Am. Ed. 113,) it is clear the interest was paid only until or before the 26th inst.—that is, embracing the time which was completed when the 26th day commenced. We do not conceive the illustrations referred to by the counsel at all pertinent. But, even if it should be held "to the 26th" included the whole of that day, the evidence does not show at what moment the interest was paid; and the burden being on appellants to prove an extension, what authority is there for presuming the payment was made, in the absence of proof, at one particular moment more than another? Why not presume it was made at the last possible moment of that day, when no time was left to which the contract could be extended on that day?

There is, to our apprehension, an utter failure in the evidence to sustain the theory of appellants. Had it been designed, by the payment of interest, to extend the time of payment of the notes, surely, it must have been known to the principal who made the payment. He does not pretend there was such a contract, nor was it attempted to be proved by him there was.

The judgment is right, and must be affirmed.

Judgment affirmed.

Syllabus.

MARCUS BELDEN
v.
SAMUEL D. PERKINS.

1. ASSUMPSIT—*for money had and received.* In an action of assumpsit for money had and received, the main inquiry is, whether the defendant holds money which, in equity and good conscience, belongs to the plaintiff.

2. It is frequently called an equitable action, and it approaches nearer to a bill in equity than any other common law action, and, indeed, has many of the advantages, without the formalities and dilatory proceedings of a chancery suit.

3. If a plaintiff delivers property to his creditor, to be sold by the creditor at his option, and the creditor sells to a third party, who converts the property into money, such plaintiff can not recover in a suit against such purchaser for money had and received.

4. PLEDGE—*what constitutes.* Where a tenant placed a lot of corn in the hands of the administrator of his landlord, as security for the payment of rent due, it was *held*, the legal status was that of pledged property; and the mere fact that the pledgor had the right to determine the time when the corn should be sold, did not affect the legal character of the contract.

5. MEASURE OF DAMAGES—*where pledged property has been sold.* Where property held in pledge, has been sold by the pledgee, without notice to or the consent of the pledgor, when, by the terms of the contract under which the property was pledged, the pledgor had the right to determine the time when the sale should be made, in an action by the pledgor against the purchaser from the pledgee for money had and received, the plaintiff will be entitled to the market value of the property at the time it was converted into money by the defendant.

6. RECOUPMENT. If the owner of property delivers the same to his creditor, as security for a debt, but reserves the exclusive right to determine when and how it shall be sold, and the creditor sells it without the knowledge or consent of the owner, in an action by the owner against the creditor for money had and received, the creditor may recoup the amount of the debt for which the property was pledged, and the same rule would apply if the suit was against the purchaser of the property.

7. PLEDGE OF PROPERTY TO SECURE A DEBT—*rights and power of pledgee.* Where property is pledged, the pledgee acquires a special property therein, and he may transfer the same without impairing the original lien thereon, or giving the owner a right to reclaim it on any other or better terms than he could have done before such transfer.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

This was an action of assumpsit, for money had and received, brought by Samuel D. Perkins, against Marcus Belden, in the circuit court of Warren county.

The plaintiff, being indebted to the estate of A. G. Kirkpatrick, sometime in the winter of 1872–3, delivered a lot of corn to the administrator of the estate, the proceeds of which, when sold, were to be applied to the payment of plaintiff's indebtedness; the plaintiff claiming that he, and not the administrator, had the right to sell the corn. The administrator sold the corn to the defendant, Belden, who shipped and disposed of it, and this suit was brought to recover the money received by him for the corn. The plaintiff recovered a judgment for the market value of the corn, and the defendant appealed to this court.

Messrs. GLENN & MATTHEWS, for the appellant.

Messrs. STEWART & PHELPS, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by Samuel D. Perkins, in the circuit court of Warren county, against Marcus Belden, to recover the value of a certain quantity of corn.

A trial of the cause was had before a jury, which resulted in a verdict and judgment in favor of the plaintiff for the sum of $945, to reverse which, the defendant brings the record here by appeal.

The declaration contains only the common counts, to which the defendant pleaded the general issue and payment.

This being an action to recover for money had and received, it must be governed by the rules that apply to actions of that character.

In an action of assumpsit, for money had and received, the main inquiry is, whether the defendant holds money which, *ex æquo et bono*, belongs to the plaintiff.

It has been frequently called an equitable action, and, as is said in *Claflin* v. *Godfrey*, 21 Pick. 1, it approaches nearer to a bill in equity than any other common law action; and, indeed, has many of the advantages, without the artificial formalities and dilatory proceedings of a chancery suit. *Taylor* v. *Taylor*, 20 Ill. 650; *Watson* v. *Woolverton*, 41 ib. 241.

Under the equitable rules which must control in the trial of a cause for money had and received, the main inquiry in this case is, whether this judgment can be sustained.

It appears, from the record, that in the year 1868, appellee leased certain lands of A. G. Kirkpatrick, for the years 1869, 1870 and 1871. In the month of March, 1870, Kirkpatrick died, and in the year 1872, appellee held over, under the leases, and raised the corn involved in this action.

In the fall of 1872, appellee was indebted to the estate of Kirkpatrick, upon the leases, over $800, and, upon being urged by Patterson, administrator with the will annexed, of the estate of the deceased, for payment, this corn was delivered, in cribs belonging to the estate, in Kirkwood, under an agreement, that, when sold, the proceeds should be applied in payment of the rent due upon the leases.

In the fall of 1873, the administrator of the estate sold the corn, together with other corn belonging to the estate, to appellant, for 32½ cents per bushel. Subsequently, appellant shelled and shipped the corn, and paid the purchase money over to the administrator. Thus far, there is no substantial disagreement between the parties on the facts.

The appellee, however, claims that, by the contract, he, alone, had the right to sell the corn, and no authority was given the administrator to make sale, while, on the other hand, the administrator claimed that the corn was sold to him, and he had the authority to sell when he saw proper, and, at

such time as he did sell, appellee was to be credited with the then market price of the corn.

It was a question of fact for the jury to determine, from the evidence, what the contract really was, and we shall not assume the responsibility of determining whether the contract was as testified to by appellee, or by J. M. Kirkpatrick, who made the contract for and on behalf of Patterson, the administrator; that would be usurping the province of the jury.

If, however, the contract was as claimed by the administrator, it is not pretended that appellee could recover. If, on the other hand, the contract was as claimed by appellee, in the view we take of the law that must govern the facts in the case, the judgment can not be sustained.

It is true, when the contract was made, the estate of A. G. Kirkpatrick had no lien for that portion of the rent due for either of the years prior to 1872, but, when the corn was delivered into the possession of Patterson, under a contract that he should hold the possession of the property until it should be sold, and, upon a sale, the proceeds should be paid to him to be applied upon the rent due on the leases, he held the property as a pledge.

That the property was held as a pledge, and the relation of pledgor and pledgee attached to the parties, we think is clear from the authorities.

Kent, Vol. 2, page 577, defines a pledge to be a bailment or delivery of goods by a debtor to a creditor to be kept till the debt be discharged.

Substantially the same definition is given by Story, in his work on Bailments, sec. 286.

The corn in question was placed by appellee in the possession of Patterson, to be held as security for the payment of the rent due upon the leases. Such was clearly the object of the transaction. Its legal status was that of pledged property.

The mere fact that appellee had the right to determine the time when the corn should be sold, could not affect the legal character of the contract.

Patterson, the pledgee, having sold the property to appellant, a stranger to the transaction, and he having converted it into money, the debt for which the property was pledged remaining unpaid, in an action brought by the pledgor against appellant, the question to be determined then is, what is the measure of appellee's recovery, and what are the rights of appellant?

As the corn was sold without notice to or the consent of appellee, when, by the terms of the contract under which the property was pledged, he was entitled to determine the time when a sale should be made, he will be entitled to the market value of the corn at the time appellant shipped and converted it into money. Indeed, this action, for money had and received, is predicated upon the theory that appellee affirms the act of appellant in taking the corn and converting it, but seeks to recover the money received for the property.

The appellee, however, received the market value of the corn, no deduction having been made for the amount of the debt the property was pledged to secure. This can not be sustained.

Had Patterson converted the corn into money, and had appellee brought the action against him, without the payment of the debt the corn was pledged to secure, it can not be denied that Patterson would have been entitled to recoup the amount due upon the leases against appellee's demand.

This rule is founded in justice, and is sustained by the authorities.

In Story on Bailments, sec. 349, it is said, "If an action is brought, the pledgee may recoup his debt in the damages." See also, *Jarvis* v. *Rogers*, 15 Mass. 389; *Stearns* v. *Marsh*, 4 Denio, 227; *Ward* v. *Fellers*, 3 Mich. 288.

If, then, the pledgor could not recover the value of the property from the pledgee without a payment of the debt for which the property was pledged, does not the same principle apply in an action against the vendee of the pledgee?

Where property is pledged, the pledgee acquires a special property in the goods, and we are aware of no reason or principle that would prevent a transfer, nor can we perceive any reason why the mere transfer of the pledged property should destroy the original lien.

In *Jarvis* v. *Rogers*, 15 Mass. 389, after a review and reference to authorities, it is said, by one of the judges, in delivering the opinion of the court, "From these cases it appears that the pawnee may deliver the goods to a stranger, without consideration, or he may sell and assign all his interest, absolutely, or he may assign it conditionally, by way of pawn, without, in either case, destroying the original lien, or giving the owner a right to reclaim them on any other or better terms than he could have done before such delivery or assignment."

In Story on Bailments, sec. 327, it is said, "But, whatever doubt may be indulged as to the case of a mere factor, it has been decided, that, in case of a strict pledge, if the pledgee transfers the same to his own creditor, the latter may hold the pledge until the debt of the original owner is discharged."

We are therefore satisfied, both upon principle and from the authorities, that appellant had the right to show the amount of the debt for which the corn was pledged to Patterson, and, as his assignee or vendee, recoup the amount of that debt against appellee's cause of action.

This will be but just, and, as the action is an equitable one, it will as nearly preserve the rights of appellee, Patterson, and appellant, as appears possible in an action at law.

The judgment will be reversed, and the cause remanded for another trial, consistent with this opinion.

Judgment reversed.

Syllabus.

EDWARD A. MULFORD *et al*

v.

JAMES H. BEVERIDGE *et al.*

1. GUARDIAN'S SALE OF REAL ESTATE. Proceedings by a guardian to sell real estate for the maintenance of the ward is a proceeding purely *in rem*. No parties are necessary. It is *ex parte*, in the name of the guardian, on behalf of the ward, after notice to all concerned. In this particular, it differs from proceedings to sell real estate to pay debts, where the heirs are necessary parties.

2. It is the duty of a guardian making sale of real estate of his ward, to report his proceedings to the court granting the order, but as to what portion of the proceedings, or at what stage of the case the report is to be made, the statute is silent.

3. Where the decree of the court authorizing a guardian to sell real estate of his ward directed him to report such sale to the court for approval and confirmation before the same should be completed, and a sale was made, reported and approved, and, subsequent to such approval, a deed was executed by the guardian, to be delivered to the purchaser upon his securing the purchase money as required by the decree, the interest of the ward was thereby vested in such purchaser, subject to be divested in case of non-payment or refusal to secure the purchase money as required by the decree.

4. SAME—*delivery of deed to purchaser, under certain circumstances, not essential to pass title.* In this case, a guardian sold land, and executed a deed to be delivered to the purchaser upon his securing the purchase money, in accordance with the decree. The purchaser failed to do so, but, by an arrangement between the guardian and the purchaser, the latter conveyed the land to a third party, by deed, absolute on its face, but to be held by such third party and re-sold by him, and, afterwards, he did re-sell it for more than the amount bid by the purchaser at the guardian's sale, and the proceeds were accounted for to the guardian: *Held*, that, under these circumstances, it was not material whether the deed from the guardian to the purchaser at the guardian's sale was ever in the actual possession of such purchaser or not. What occurred was equivalent to a delivery, and the title acquired under these circumstances was valid.

5. The conveyance to the third party did not vest the title in him to hold permanently for the benefit of the wards, as trust property, but was in the nature of a mortgage to secure the purchase money for which the property had been sold at the guardian's sale, and he could re-sell it for that purpose without any further order of the court.

6. SAME—*not affected by irregularities after the decree of sale and the subsequent management of the funds.* Where the court has jurisdiction, and makes an order of sale, the fact that the guardian may proceed irregularly in the execution of the order, will not make the sale invalid.

7. The purchaser at a guardian's sale is not bound to see to the application of the funds, nor that the guardian renders a true account of his guardianship, and a failure on the part of the guardian in this respect can not vitiate the sale.

APPEAL from the Circuit Court of Cook county; the Hon. E. S. WILLIAMS, Judge, presiding.

Messrs. DICKEY & CAULFIELD, for the appellants.

Mr. JAMES L. HIGH, and Mr. CHARLES H. WOOD, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The original bill in this case was filed in 1863, by the heirs of Edward A. Mulford, deceased, all of whom were then minors, to set aside a deed, dated April 29, 1857, made by their guardian under an order of court, conveying to John McHugh a tract of land which they had inherited from their deceased father. The estate had been conveyed several times, but the grantees all being charged with having had notice of the equities of complainants, they were made defendants, and relief was sought against them.

Briefly, the facts are: McHugh bid off the land at the guardian's sale. A deed was made, ready to be delivered to him if he should comply with the conditions as to securing the purchase money, but, for some reason, he failed to comply. Either on his own proposition or at the request of John L. Beveridge, the solicitor of the guardian, McHugh conveyed the land to him, to be by him re-sold for the benefit of the wards. A sale was effected to James H. Beveridge, for a sum exceeding the amount bid by McHugh, which was treated as other funds belonging to the common estate. James

H. Beveridge afterwards conveyed two-fifths of the land to his brother Andrew M. Beveridge. On the hearing, the circuit court decreed relief, and set aside the several conveyances. That decree was, however, afterwards reversed in this court, on account of error that intervened, not affecting the merits of the case.

Meanwhile, by the death of one of the original complainants, and the marriage of another, the heirs of the deceased ward and the husband of the other became necessary parties, and were made so by an amended and supplemental bill, by which John L. Beveridge was also made a party defendant. Mrs. Mulford, who was the guardian that made the sale of complainants' land, afterward intermarried with Haggerty, and became a party complainant as one of the heirs of her deceased ward. After a cross-bill had been filed by Andrew M. Beveridge to quiet his title, and on the final hearing of the cause, the other complainants asked leave to dismiss her as complainant, and make her a defendant, but the court refused leave. Answers and replications having been filed, proofs were taken, and, on the hearing, the court dismissed the original, amended and supplemental bills, for want of equity, but decreed relief on the cross-bill.

The irregularities that are said to vitiate this sale, and render void all the conveyances to subsequent grantees having notice, all occurred after the decree under which the sale was made.

That the court had jurisdiction to pronounce the decree, is not contested; but if it was, we should regard that question as *res adjudicata* in this court. On bill filed by complainants to contest the validity of other sales of property under this same decree, it was held the court had jurisdiction. *Mulford et al.* v. *Stalzenback et al.* 46 Ill. 303.

The radical error in the theory of the case on which relief is expected, lies in the assumption that the title never passed to McHugh, for the reason the guardian's deed was never in fact delivered to him.

Proceedings by a guardian to sell real estate for the maintenance of the ward, is a proceeding purely *in rem.* No parties are necessary. It is *ex parte,* in the name of the guardian, on behalf of the ward, after notice to all concerned. In this particular, it differs from proceedings to sell real estate to pay debts, where the heirs are necessary parties under the provisions of our law.

The statute under which this sale was made, provides, an order of the court may enable the guardian to sell and convey the real estate for the support and education of the ward, or to invest the proceeds in other real estate. The court making the order is to direct the time and place of sale, the notice to be given, and may require of the guardian or purchaser such security as the interests of the ward may require. It is made the duty of the guardian making the sale to make return of such proceedings to the court granting the order, which, if approved, shall be recorded, and shall vest in the purchaser all the interest the ward had in the estate sold. R. S. 1845, p. 267, sec. 10.

As to what portion of the proceedings, or at what stage of the case, the report is to be made, the statute is silent. In the case at bar, the order directed the guardian to "report such sale to this court for confirmation and approval before the same shall be completed," which was done, the sale approved and the guardian directed to make the deeds. The statute, in terms, does not require the deed made on the consummation of the sale to be approved by the court, nor did the decree in this case require it. Most material is the sale, that the court may see whether the interest of the ward is being sacrificed. The land was sold to McHugh, the sale approved, the report recorded, and, under the statute, upon the subsequent making of the deed, it would seem that that would vest in him all the interests of the wards, subject, however, to be divested in case of non-payment of the purchase money, or a refusal to secure it as required by the decree. That title was never divested by any order of court. A deed was exe-

cuted to him, in consummation of the sale, under the direction of the court. Whether that deed was ever in the actual possession of McHugh, can not be a material question, in view of what followed. What occurred, was equivalent to a delivery. It could not, with propriety, be delivered to him before the purchase money was either paid or secured. It was treated as having been delivered to him to enable McHugh to convey the property to John L. Beveridge, that he might re-sell it and thus realize the amount bid, for the benefit of the wards. After that there was no necessity for leaving it in his possession. What possible difference could it make to the wards whether McHugh conveyed the land to Beveridge by mortgage deed or an absolute deed, to secure the purchase money? In *Mulford* v. *Stalzenback, supra,* the mortgage given by one of the purchasers was not given to the guardian, as required by the decree, but to a third party, and that was declared to be a mortgage "on the land sold" to secure the purchase price, and, being afterwards satisfied, there was no just ground of complaint on that score. Here, the conveyance was to John L. Beveridge, by the consent of the guardian, and, although absolute in form, it was but a mortgage to secure the purchase price. The land was afterwards sold for a sum in excess of the bid made by McHugh, and the proceeds accounted for to the guardian, for the use of the wards. Thus the original bid and something more was realized. What just grounds, therefore, exist for complaint? By this arrangement, the guardian not only secured the original bid, but a considerable sum in addition. The mortgage required by the decree could not have more effectually secured it, while the mode adopted added a profit. Whether the land was sold to James H. Beveridge for $2000 or $2500, does not affect the legal principle involved. Either sum is in excess of McHugh's bid.

The second objection, assuming the naked title passed to John L. Beveridge by McHugh's deed, it was in trust for the wards, and could not be re-sold without further order from

the court, is founded on a mistaken view of the purpose for which the title was placed in him. The estate was not vested in him to hold permanently, for the benefit of the wards, as trust property; but the conveyance by absolute deed was only another mode, as we have seen, of securing the purchase money, and, as the sequel shows, was both an effectual and profitable mode. Had McHugh, by consent of the guardian, conveyed the land to Beveridge, by deed of trust containing a power of sale, it would hardly be insisted an order of court would be necessary to enable him to exercise the power. It is true, the property was in Beveridge in trust for the benefit of the wards, but it was there to be re-sold, in execution of the order of the court, in the language of the statute, to "enable the guardian to sell and convey the real estate for the support and education of" her wards. No further order of the court was necessary to enable him to make the sale. That had already been made, and the guardian directed, by further order, to complete it. Inasmuch as the wards were benefited, and in no manner injured by the mode adopted, it affords no just cause for setting the sale aside.

The other irregularities insisted upon have reference to the execution of the order of sale and the subsequent management of the funds. The court had jurisdiction, and, notwithstanding the guardian may have proceeded irregularly in the execution of the order, the sale, for that reason, is not invalid. This point was expressly ruled in *Mulford* v. *Stalzenback*, *supra*, and authorities are there cited in support of the principle.

The fact that the guardian may have reported to the court a less amount than the property really sold for, can not vitiate the sale. On a bill by the wards, against their guardian, for an account, that would be an important inquiry, but it can not affect the title acquired by the purchaser. He was not bound to see to the application of the funds, nor that the guardian rendered a true account of her guardianship.

That this estate that descended to complainants from their father, now of the value of between a quarter and a half mil-

lion of dollars, has been substantially lost to them, is no doubt true, but no part of that loss can be attributed to the fact McHugh did not secure his bid for a portion of the estate by a mortgage to the guardian, instead of by an absolute deed to John L. Beveridge.

In view of the extraordinary rise in the value of real property, it is perhaps unfortunate that any portion of complainants' estate was ever ordered to be sold, but that affords no sufficient reason for setting the sale aside. No doubt many other tracts of land in the vicinity have, since then, been sold at private sale by the owners, and voluntary conveyances made, that have correspondingly increased in value.

It is a matter of public notoriety, of which courts may take judicial notice, that real property in the vicinity of Chicago, where this is situated, has, since this land was sold, increased in value many times. This fact, no doubt, has given rise to much complicated litigation in regard to real estate.

When the case was about to be submitted for decision, after the evidence had all been heard, complainants again asked leave to file another amended bill, to make the pleadings correspond more nearly with the facts proven, which was denied by the court. Whether they were entitled, at that stage of the case, as a matter of right, to file another amended bill, is a question about which we need not express an opinion. The amended bill was but a re-statement of the facts in the case as the complainants understood the evidence. Even conceding the right, no grounds for relief were shown; hence complainants were not prejudiced by the decision of the court refusing leave to file the amended bill.

Whether the court proceeded regularly in decreeing relief on the cross-bill of Andrew M. Beveridge, did not affect prejudicially the rights of complainants, for the decree dismissing the original, amended and supplemental bills, for want of equity, would as effectually bar their rights as the decree on the cross-bill quieting title.

Waiving all questions whether the proof and allegations of the bill correspond, the evidence shows no ground for equitable relief, and the decree must be affirmed.

Decree affirmed.

Mr. JUSTICE SCHOLFIELD and Mr. JUSTICE CRAIG, dissenting:

We do not concur in this opinion. We hold that the confirmation of the guardian's report can vest title in the purchaser only when it shows a sale, and the execution and delivery of a deed, in conformity with the terms of the statute. Title can not pass except by the execution and delivery of the deed. The evidence is clear that McHugh did not comply with the terms of the sale, and no deed was ever delivered to him. He, therefore, never had title. John L. Beveridge knew this when he obtained the pretended title. He was attorney for the guardian, and the proceedings connected with the pretended sale were all taken under his direction. He could not purchase from the guardian at private sale, and he could not purchase from McHugh a title which McHugh did not have. Whatever may be said in favor of Andrew M. Beveridge as a purchaser in good faith, without notice, can not apply to James H. Beveridge. He should be charged with notice, and to the extent of his interest, at all events, we think the decree should be reversed.

JOHN A. OWEN

v.

WILLIAM STEVENS.

1. STATUTE OF FRAUDS—*undertaking collateral to the promise of another, not in writing, void.* Where the owner of a building being erected said to a material-man, who had already furnished materials to the contractor who was building the house, that he would pay for all the materials that

PROPERTY OF
BERNARD E. WALL

the contractor might get for the building, it was *held*, that the owner was liable, on his promise, for all materials furnished thereafter for such building and charged to him, but that he was not liable for such as had, before the promise, been furnished to the contractor.

2. PRACTICE IN SUPREME COURT. This court can not act upon and give effect to an affidavit impeaching the correctness of a transcript filed herein, as against the certificate of the clerk.

3. SUPERIOR COURT OF COOK COUNTY—*what the record should show when a circuit judge presides.* Where a circuit judge holds the Superior Court, the record should show what judge presided, and that he did so by request of the judges of said court, as a branch court, in pursuance of the statute.

4. Where the record shows that there were three judges of the Superior Court present at the trial, and further shows that a circuit judge actually presided on the trial, it is contradictory and informal, and shows not such an organization of the court as litigants are entitled to have when their cases are tried.

APPEAL from the Superior Court of Cook county.

Mr. D. S. COOMBS, for the appellant.

Mr. F. W. S. BRAWLEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was an action of assumpsit, on the common counts only, brought to the Superior Court of Cook county, by William Stevens, plaintiff, against John A. Owen, defendant. The issue was non-assumpsit, and the trial by a jury, who found for the plaintiff, and assessed his damages at two hundred and fifty-seven dollars and twenty-seven cents, for which the court rendered judgment, having denied defendant's motion for a new trial.

To reverse this judgment the defendant appeals, and makes the point that the undertaking alleged and proved was collateral to the undertaking and promise of Fancher, and, not being in writing, has no binding force.

The facts are briefly these: Appellant had made a contract with E. J. Fancher to build him a house at Glencoe, the builder to furnish the materials. In order to do this, Fancher

made a contract with appellee, who was the proprietor of an establishment for the manufacture of the necessary materials, to furnish the same. He commenced doing so, and having furnished an amount of the value of one hundred and fourteen dollars and fifty cents, which Fancher did not pay, when asked for money by appellee, he requested appellee to go with him to appellant's office, where Fancher said to appellant: "Mr. Stevens wants some money; he won't send any more stuff until he knows how he is going to get his pay." The account was stated, at that time, to be one hundred and fourteen dollars and fifty cents. Appellant replied, he would see appellee paid for all the stuff he put into that building, and, turning to Fancher, said: "Is that right, Mr. Fancher?" to which Fancher replied: "That is right; that is just the way I want it." Appellant then paid on the amount one hundred dollars. This was on the 29th of October, 1873. Appellee thereafter continued to furnish stuff for this building, charging them in account to E. J. Fancher, when, on December 4, he presented another account to appellant, amounting to five hundred and seventy-two dollars and fifty-five cents, with this sum of one hundred dollars credited, leaving a balance of four hundred and seventy-two dollars and fifty-five cents, on which appellant paid fifty dollars. There was also a deduction for defective materials returned, of one hundred and sixty-five dollars and twenty-eight cents, leaving the balance, for which the jury found the verdict.

It is very evident this balance, so found by the verdict, includes so much of the account first presented to appellant as he did not pay. The account was one hundred and fourteen dollars and fifty cents; paid by appellant, one hundred dollars thereon; leaves a balance of fourteen dollars and fifty cents. By all the proof, this account was against Fancher, on his promise and undertaking with appellee, with which appellant had no connection. The credit was given wholly to Fancher. On his promise the stuff was delivered by appellee, and not on appellant's promise.

The payment by appellant of one hundred dollars on this account was a favor to appellee, but did not bind him to pay the balance. He is bound alone, by the promise then made, to pay for all materials that should thereafter be put into the building by appellee, for such is the proof, as we understand it. Consequently, the verdict is too large by the sum of fourteen dollars and fifty cents.

But it is urged by appellee, that appellant promised to pay this sum. Suppose he did; it was a promise without any consideration, and collateral to Fancher's promise. Fancher was the debtor to appellee. For all materials furnished by appellee prior to October 29, Fancher was originally and primarily liable. In all subsequent, appellant is liable on his promise, made on that day, to pay for all the material that should go into the building.

There is some conflict in the evidence as to the nature of appellant's promise, but we think the weight of evidence establishes the view we have taken of it.

Complaint is made by appellant that the court refused to give this instruction on his behalf:

"The jury are instructed, that if they find, from the evidence, that a contract existed between the plaintiff, Stevens, and Fancher, to furnish the goods in question for Owen's house, that such contract did not bind defendant, Owen, to pay Stevens for them, unless the jury first find, from the evidence, that Owen subsequently assumed Fancher's contract, and promised Stevens to pay him for the same; and if the jury find such to be the case, the defendant can not be held liable to pay for any goods delivered before Owen made such agreement with Stevens, for the reason that there is no consideration for such agreement, and the jury should give Owen credit for all money paid by him, to be applied in payment for goods furnished subsequently to such agreement by Owen."

In the view we have of this case, as above expressed, this instruction was proper, and should have been given. Had it been given, the jury would not have found so large a verdict, by fourteen dollars and fifty cents, as they did find. And more especially in view of the instructions given for appellee, which, though not faulty in themselves, did not present the law as fully as the evidence required, and which the defendant's refused instruction supplied.

For the reasons we have given, the judgment must be reversed and the cause remanded. In doing so, we will dispose of other points made by appellant.

The first is as to the form of this record. It shows, on its face, there were three judges of the Superior Court present at this trial, and further shows that Judge Murphy, judge of the second judicial circuit, actually presided on the trial. We know of no authority for this. Our views on this subject are fully expressed in *Jones* v. *Albee*, 77 Ill. 34, and *Hall* v. *Hamilton*, Sept. T. 1874. It is of no importance to be informed of the names of the judges of the Superior Court, in a case neither of those judges tried. The *placita* should have read: Present, Theodore D. Murphy, judge of the second judicial circuit, presiding and holding this term of the court by request of the judges of the Superior Court, as a branch court, in pursuance of the statute in such case made and provided. The record, as made out, is contradictory, informal, and shows not such an organization of the court as litigants are entitled to have when their causes are tried.

Another point is made, that the record shows the cause was tried by eleven jurors only. That appears from the transcript of the record, filed under the rule of this court. By actual count but eleven names of jurors appear.

On appellee's motion in this court, suggesting a diminution of the record, he has filed an additional transcript, duly certified by the clerk, by which it appears twelve jurors, whose names are given, were present and tried the cause.

To this additional transcript appellant made objection, and

entered a motion to strike it from the files, on his affidavit, going to show an interlineation of the record of the name of a juror, without leave of the court, and without the knowledge of appellant.

The affidavit makes out a *prima facie* case, but we can not act on it and give it effect as against the certificate of the clerk. If the fact is, an interpolation has been made, as stated in the affidavit, appellant, being a member of the bar, should exert himself to bring the culprit to punishment. If done by the deputy clerk, as stated in the affidavit, he should be made an example of, and held up to the condemnation of the public.

But if there were but eleven jurors trying the cause, appellant knew it, and made no objection. He was present at the trial, was a witness in the case, is a practicing lawyer, and must be presumed to have assented to the irregularity. The verdict, under such circumstances, ought not to be disturbed.

For the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

MARY BROWNFIELD

v.

MARY ANN WILSON *et al.*

1. WILLS—*rules of construction.* In the construction of wills or other instruments, in cases of doubt all the parts should be considered together, and, if possible, effect should be given to every clause and provision according to the intention of the maker.

2. Technical rules are not so rigidly applied in the construction of wills, which are frequently written by persons unskilled and imperfectly acquainted with the accurate meaning of language, as in the construction of deeds; but the question, however, is, the entire instrument being considered, what did the testator intend by the will.

3. A latter clause of a will is to be considered, when repugnant to a former provision, as intending to modify or abrogate the former.

4. Whilst courts, in cases of doubt, may resort to surrounding circumstances to afford light in which to read the will and ascertain the intention of the testator, still they should never control—they are intended as mere aids.

5. SAME—*declaration of testator.* In construing wills, courts can not resort to the declarations of the testator, either before or after the execution of the will, to control its provisions.

6. SAME—*whether in fee, or only a life estate.* By one clause of his will a testator gave to his wife a certain tract of land, and by a subsequent clause he gave to his children, to share equally and alike in his real estate—the real estate to be sold after his wife's death: *Held*, that the wife took a fee simple estate, and not merely an estate for life.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLIAMS, MCKENZIE & CALKINS, for the appellant.

Messrs. HUMPHREY & SNOW, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

In the month of August, 1871, Christian Brownfield made and published his last will and testament, which contains two clauses, out of which this controversy has grown. They are these:

First. "I give and bequeath to my beloved wife, Mary Brownfield, forty acres, viz: the north forty where the house and orchard now stands on."

Second. "I give and bequeath to my heirs, John Brownfield, and Mary Ann Brownfield, and Margaret R. Brownfield, Catharine Jane Brownfield, Nancy Elizabeth Brownfield, Sarah Louise Brownfield, Susannah Armstrong, to share equally and alike in my real estate, and also my personal property; the personal property to be sold after my death, and the real estate after Mary Brownfield's death."

The heirs, being dissatisfied with the will, and Mrs. Brownfield being a step-mother, filed a bill to set it aside, on the grounds that it had been obtained by undue influence, and that the testator, at the time of its execution, was not of sound mind and memory. But subsequently these grounds were abandoned, and the bill was amended, asking the court to construe the will, and to decree that the widow took by the will but a life estate in the real estate named in the first clause. A trial was had on the bill, answer, replication, exhibits and the proofs, when the court found and decreed that the widow took, under the first clause of the will, but a life estate. And from that decree Mrs. Brownfield appeals to this court.

The question has not been raised as to the power of the court to entertain a bill simply to give a construction to a will, and we will therefore not examine or discuss that question, but we will proceed to determine whether the court erred in rendering the decree. This is the only question pressed in argument, and we shall confine ourselves alone to its consideration.

Both parties are agreed, that, if the first clause were considered alone, it devises to Mrs. Brownfield the forty acres upon which the house and orchard are situated in fee simple absolute; but appellees contend, that, when considered with the second clause, it is manifest that it limits the devise by the first to a life estate in the devisee—that this is the true construction of these two clauses. On the other hand, appellant claims and insists that the second clause is entirely separate from and has no reference to the first, and consequently has no control over it, or the title or estate devised therein. This is the precise question presented by this record for solution.

It is one of the familiar rules of construction, whether of a will or other instrument, that in cases of doubt all of its parts should be considered together, and, if possible, to give every clause and provision effect, according to the intention of the

maker. When ascertained, the intention of the testator must be enforced. And, inasmuch as wills are frequently draughted by persons unskilled, and who are imperfectly acquainted with the accurate meaning of language, and are wholly unacquainted with the technical meaning of words, and have no knowledge of the theory of tenures, as they obtain in our system of jurisprudence, technical rules are not so rigidly applied as in the construction of deeds. The question, however, is, the entire instrument considered, what did the testator intend by the will? Then, when this will is considered, what, if any, effect, had the second clause upon the first?

A latter clause of a will is to be considered, when repugnant to a former provision, as intending to modify or abrogate the former. Now, when the testator had given to his wife the home forty acre tract in fee, can we suppose in the very next sentence he gave, or intended to give, the same without limitation, except that it, with his other real estate, should, at the time named, be sold, and the proceeds divided among his heirs. Such a supposition can not be indulged, unless the language employed will bear no other construction. And yet, if the phrase, "to share equally and alike in my real estate," was intended to embrace all of his lands and tenements, it would revoke the devise in the first clause, because he gives and bequeaths to the persons named, real estate, to be shared alike and equally between them. Now, if this phrase embraces, or by fair intendment could be held to embrace, all of his real estate for any purpose, it must be held to do so for all purposes; and if for all purposes, then the devise to the heirs was absolute, and the first clause was abrogated. If such had been his intention, just having made the previous devise, he unquestionably would have said so in language that could not have been mistaken. Had he changed his mind after the first clause was written, in so important a matter, he would have said so, in the second or some other clause of the will. We are, therefore, of opinion that the testator

intended to secure to his wife some interest in the home tract—either a life estate or a fee.

Having given to his wife a fee, by the first clause in the will, he having used no express language for the purpose, we are fully warranted in the inference that he had no design to limit or modify that devise. If, as we have seen, the devise in the second clause did not revoke the devise in the first, how can it be held to change the devise of a fee and limit it to a life estate? The language employed either implies an entire revocation and a new devise of the property named in the first clause, or it leaves it unaffected. If testator did not intend to abrogate the first devise, how can we say that he intended to limit or modify it? He used no language that can possibly be construed to have the latter and not the former effect. Had he intended the land in the first clause to have been sold, we regard it as almost morally certain that he would have required it, in plain language, to have been done after the death of the devisee, thus limiting the first devise to a life estate. We are clearly of opinion that the second clause must be read as devising to the persons named the remainder of his real estate, after excluding the forty acres named in the first clause. This seems to us as the only reasonable interpretation that can be given to this clause, when considered in connection with the first.

But, it is urged that the fact that the second clause requires the real estate to be sold on the death of his wife, manifests an intention to embrace all of his real estate in the sale and division. Now, the real estate referred to and required to be sold is, unquestionably, the same that was devised by that clause. It could have referred to no other. If the requirement of the sale embraced the land devised in the first clause, then the devise in the second clause embraced the land in the first, and the first was revoked, and we have seen that there was no revocation. Hence the requirement of a sale, the devise therein only related to the remainder of his real estate not embraced in the first clause.

But it is asked, why hold the property without sale until after the death of his wife, unless the portion devised to her was intended to be sold with the other, and the proceeds divided in the same manner? It may be asked, why he reserved the remainder, in which he gave her no interest whatever, either present or contingent, from sale until her death. Had he given her a life estate in the residue of his real estate, then the purpose of reserving it from sale until that time would have been obvious. If the reasoning by which testators arrive at conclusions which govern them in the disposition of their property was required to be ascertained before a will could be sustained, but few would stand the test, unless the testator should, in his will, explain the reason inducing him to make each provision. In this case, he may have supposed that the land would appreciate in value, or he may have had ample reasons for such a course from prudential and family considerations. As he gave Mrs. Brownfield no interest in the portion devised to the heirs, and he reserved it from sale, we can not see that it has any, the least, controlling effect on the devise to the widow.

Whilst courts, in cases of doubt, may resort to surrounding circumstances to afford light in which to read the will and ascertain the intention of the testator, still they should never control. They are intended as mere aids. Nor can the courts resort to declarations of the testator, before or after the execution of the will, to control its provisions. If such declarations should be allowed to give an interpretation, then, in this case, there would be no difficulty, as the testator said, afterwards, that he had given the home forty to his wife, and the rest of his real estate was to be divided between his children and the blind girl.

It is urged that, in cases of doubt, like the present, we should look and see who are the natural objects of his bounty, as explaining the intention of the testator. If we were to do so in this case, we do not see that the result could be changed. For aught that appears, Mrs. Brownfield and her children

may have contributed as much or more to the acquisition of this property as he and his children. He said to his spiritual adviser that she had been to him a good wife, and to such, we apprehend, there can be no greater object of consideration and bounty. Children may be selfish, neglectful and inconsiderate of the comforts and wants of parents, but the devoted wife is self-sacrificing, unselfish, and ministers to the wants of the husband till the last. In such cases, no reason is perceived why a husband may not justly remember and reward such devotion, even beyond negligent or disrespectful children. Nor should the mere fact that they are of his blood, control or have any high consideration on a question of this character.

The law has fully invested all persons of sound mind and memory with power to dispose of their property by will, nor does it, in the slightest degree, undertake to say who shall be the objects of his bounty. In that, he is left free to act as he may choose. He may dispose of his property as he likes, and to whom he prefers, even to the disinheritance of his children. He is to be left to determine whether others, even strangers, are not more worthy objects of his bounty than his children. The evidence seems to show that his mind was clear, and that he fully comprehended the nature, scope and effect of the will he made, and no reason appears for refusing to carry it into effect.

The decree of the court below must be reversed, as a mistaken construction has been given to the will, and the bill will be dismissed.

Decree reversed.

JAMES H. CLARK *et al.*

v.

THE SCHOOL DIRECTORS OF DISTRICT No. 1, etc.

1. SCHOOL DIRECTORS—*powers of, to purchase property and contract debts.* The powers of school directors all exist under the statute, and are extremely limited. They may appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid, and the form of the orders to be drawn by them on the treasurer of the township is prescribed by statute, and must be followed; and such orders can not be made payable on time, or draw interest.

2. SAME—*not liable on the quantum meruit for libraries or apparatus purchased for schools.* The authority given to school directors by statute, to "appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid," is a limitation of their power to make such purchases to the circumstances named, and is an implied restriction of any power to purchase generally on credit.

3. A purchase of such articles by the school directors on a credit, where it does not appear that there were any surplus funds, after all necessary school expenses were paid, applicable to such purchase, is void, and there is no contract implied by law to pay for articles thus purchased, arising from their receipt and use.

4. The only remedy of the seller, under such circumstances, is, to claim the property itself

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. ROFF & HARRIS, for the plaintiffs in error.

Messrs. HOLLAND & AYERS, and Mr. S. G. BOVEE, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a suit, originally commenced before a justice of the peace, in favor of Clark & Lake, against The School Directors of District No. 1, Town. 27, Iroquois county, Illinois, where a verdict and judgment were rendered in favor of the defendants.

On appeal by plaintiffs to the circuit court, a like verdict and judgment were there rendered against them, from which latter judgment they bring this writ of error.

The record shows, that, on the trial in the circuit court, the plaintiffs offered to prove, that on the 26th day of October, 1871, one Riggs, agent for the plaintiffs, sold to the defendants, through two of its directors, certain school apparatus, consisting of one school set of stereoscopic views, with scope, and elements of geography and history, at the price of $53, to be paid for in one year, with interest at six per cent, and ten per cent after due, and took from the defendants an order for the purchase price and interest, as follows:

STATE OF ILLINOIS, }
County of Iroquois, } *ss.* *Oct.* 26, 1871.

Treasurer of township 27 north, range No. 14, in said county, on or before the first day of April, 1872, pay to Clark, Lake & Co., or bearer, the sum of $53, out of any money belonging to school district No. 1, in said township, for one school set of stereoscopic views, with scope, and elements of geography and history, with interest, at the rate of six per cent, and ten per cent on the amount after due.

PETER BROUILLETTE,
SMART WALKER,
School Directors.

That the school apparatus was delivered to the defendants, accepted, and used in their school, and what was its value; that after the time of payment had expired, the order was duly presented for payment, and payment refused, not for want of surplus funds with which to pay it, but upon the ground that the order was void upon its face; that the defendants refused to draw another order to pay anything whatever for the goods. But the circuit court refused to permit such proof to be given to the jury, and no other evidence being offered, the jury returned a verdict for the defendants.

The error assigned is, the exclusion of this offered testimony.

By the statute, the directors of a school district are declared to be a body politic and corporate, by the name of "School Directors of District No. —," etc. They are made liable, as directors, for the balance due teachers, and for all debts legally contracted.

"For the purpose of * * * procuring furniture, fuel, libraries and apparatus, and for all other necessary incidental expenses, the directors of each district shall be authorized to levy a tax, annually, upon all the taxable property of the district, not to exceed two per cent for educational and three per cent for building purposes. * * * They may also appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid." Rev. Stat. 1874, p. 960, sec. 43.

The statute further prescribes the form of school orders to be drawn by the directors on the treasurer of the township, according to which form they are neither payable on time nor with interest.

This comprises, essentially, all the powers of school directors, as regards the subject matter involved in this suit. Their powers all exist under the statute, and are extremely limited.

The order in question is not in accordance with the prescribed statutory form.

It is supposed that, although it may not be so, and though no action may lie upon it, yet there may be a liability upon a *quantum meruit*, the school directors having received and enjoyed the use of the property.

The authority given to the school directors by the statute is, that they "may appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid." This would seem to be a limitation of the power to make purchases of this kind to the circumstances named, and to be an implied denial of any power to purchase generally on credit. There was no attempt or offer to show that there were any surplus funds, after all necessary school expenses were paid, applicable to the purchase which

was here made. The order implies the contrary, as it is payable at a future day, with interest, and generally out of any money belonging to the school district.

Under the evidence offered, we are of opinion that the contract of purchase should be held to be unauthorized and void, and that there should not be any contract implied by law to pay for the articles arising from their receipt and use; and as there was no other evidence offered, we perceive no error in the exclusion of the evidence which was offered. The plaintiff's only remedy, in our view, is, to reclaim the property itself.

The judgment will be affirmed.

Judgment affirmed.

MARTIN MATZON *et al.*

v.

GEORGE B. GRIFFIN.

1. REAL ESTATE—*what it embraces.* The term "real estate" embraces lands, tenements and hereditaments, and the general rule is, that buildings erected upon and fixed to land, become a part thereof.

2. A building may be erected by a tenant upon leased premises, and, by agreement with the landlord, held as personal property, and removed at the expiration of the term.

3. SAME—*buildings erected by the mortgagor on the mortgaged premises.* Where a mortgagor, whilst the owner of the equity of redemption, erected a house upon the mortgaged premises, without any agreement with the mortgagee, the same became a part of the realty, and passed with it to the purchaser under the foreclosure of the mortgage.

4. In such case, where the mortgagor, after foreclosure of the mortgage, removed the house from the land, and the purchaser under the mortgage brought replevin, and recovered a judgment, the judgment was affirmed.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. JUSSEN & ANDERSON, for the appellants.

Messrs. RICABY, BALDWIN & HANNA, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

May and Kaufman, on the 15th day of January, 1872, owned the premises upon which the house in controversy was situated, and on that date they conveyed the premises to Matzon, Peterson and Dibbon. On the 1st day of February, 1872, the deed was recorded.

On the day the deed was executed, Matzon, Peterson and Dibbon conveyed the premises, by trust deed, to one Beckerdeke, as trustee, to secure certain notes given to May and Kaufman for a part of the purchase money, which trust deed was recorded January 19, 1872.

On the 9th day of September, 1872, on default of payment of the notes secured by the trust deed, the trustee sold and conveyed the premises to Milton Meeks. On the 13th of December, 1872, Meeks conveyed to Traver, and on the 25th day of January, 1873, Traver conveyed to appellee, Geo. B. Griffin.

After the purchase of the premises, which consisted of certain town lots, by consent of Peterson and Dibbon, Matzon erected the house in controversy upon one of them, which, on the 22d of March, 1872, he sold to one Backman, who leased the house to Matzon.

After appellee had acquired title to the premises, he brought an action of ejectment and recovered possession. Subsequently, appellants, under the direction of Backman, moved off the house, and this action of replevin was instituted to recover the property.

The decision of the cause hinges upon the question, whether the house in controversy was, at the time of its removal by appellants, real or personal property. If it was real property, then appellee was entitled to recover it. If, on the

other hand, it was personal property, appellants had the right to move it from the premises.

It will be observed that the trust deed, under which appellee derived title to the premises, was upon record prior to the time Backman purchased, and he can not claim to be ignorant of its contents or legal effect. He was bound to take notice of the rights of the mortgagees, and the obligations of the mortgagors under the deed of trust.

After the execution of the trust deed by appellants and Dibbon to May and Kaufman, the relation of mortgagor and mortgagee existed between the parties. The legal title to the premises was in the trustee, while the equity of redemption remained in the mortgagors. The latter were in the possession of the premises, and had the right to possess, use and enjoy the same until a default in the payment of the money secured by the deed of trust.

But, while the mortgagors had the right to occupy and use the premises, they had no power to commit waste, or do any act which would impair or lessen the security of the mortgagees. Should the mortgagor, while in the possession, attempt to commit waste, or sell or remove buildings from the land, which were a part of the realty, a court of equity would use its restraining power to prevent it.

If, on the other hand, a building should be severed and removed, which had become a part and parcel of the premises, after the equity of redemption of the mortgagors had been foreclosed by sale, and before resort was had to a court of equity, we are aware of no reason that would prevent it from being followed and retaken by process issued from a court of law.

If the building in question was a part of the mortgaged premises, it follows that its removal by appellants was unauthorized.

It is true, a building erected by a tenant upon leased premises, by an agreement with the landlord, may be removed as personal property at the end of the term, but no such relation

existed between the parties to this record, and hence the rule that governs such cases has no application here.

The general rule of the common law is, that buildings erected upon and fixed to lands, become a part thereof, and belong to the owner of the premises, it being a fundamental rule that the term "real estate" embraces lands, tenements and hereditaments.

All improvements of a permanent character placed upon lands, which facilitate the use, can not be regarded otherwise than as a part of the realty. When a building is, therefore, erected, *prima facie* it is a part of the land upon which it stands, and in order to rebut the presumption of the law, a state of facts must be shown to take it out of the operation of the general rule. *Dooley* v. *Crist*, 25 Ill. 551.

When Matzon commenced the erection of the building in question, he owned the premises upon which it was built, in connection with Peterson and Dibbon, subject to the estate conveyed by the deed of trust.

No contract was made with the mortgagees by which Matzon could erect the house and hold it as personal property with the right of removal; on the contrary, so far as it appears from the record, he commenced the erection of the house as an owner of the soil, and, as a permanent improvement of the property.

The record contains no evidence tending to remove the presumption which exists in all cases where an owner of land erects a building upon it.

It is true, Matzon may have changed his original intention in regard to the permanent character of the improvement, after becoming somewhat involved in the erection of the building, but, as was held in *Dooley* v. *Crist*, *supra*, such a change of intention could not affect the nature and character of the improvement.

But whatever may have been the secret intention of Matzon at the time the building was erected, or subsequently, it can not change the result.

The mortgagees had an estate in the premises, and when the house was erected, in the absence of a contract that Matzon might sever and remove the house, it became a part and parcel of the premises, and the sale under the trust deed vested the title to the premises in appellee.

We can not sanction the doctrine contended for, which, when carried to its legitimate results, would permit a mortgagor to sever and remove buildings erected permanently upon mortgaged premises. It would not be equitable, nor can it be sustained by authority.

The judgment will be affirmed.

Judgment affirmed.

WILLIAM PATON *et al.*

v.

HART L. STEWART.

1. FAILURE OF CONSIDERATION—*agreement to dismiss legal proceedings.* If a promissory note is given, with a guaranty of payment, in consideration that the payee shall dismiss a proceeding in bankruptcy against the maker, and such proceeding is not dismissed, there will be a failure of the consideration, which may be set up by the guarantor in a suit upon the guaranty by the payee.

2. EVIDENCE—*jury to judge of the weight.* The weight to be given to the testimony of a witness is for the jury to determine, and this court will not reverse or supervise their finding on such a question.

3. CONTRACT—*if founded on an illegal consideration, will not be enforced.* Courts will not lend their aid to enforce an executory contract founded upon an illegal consideration.

4. SAME—*composition with a bankrupt.* If a creditor commences proceedings in bankruptcy against his debtor, for the purpose of getting a composition to secure his claim, and agrees to dismiss the proceeding on being secured, this is an abuse of the process of the law, and the contract thus obtained will be illegal and void, as being inhibited by a sound public policy.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOHN BURNS, Judge, presiding.

This was an action of assumpsit, brought by William Paton, Thomas C. M. Paton, Jonathan Longmire, Andrew G. Agnew and William L. Paton, partners, under the name and style of Paton & Co., against Hart L. Stewart, upon his guaranty of a promissory note given by Geo. E. Gardner & Co., to Paton & Co., dated January 17, 1874, for $300, payable five months after date. The opinion of the court presents the material facts of the case.

Messrs. MCCLELLAN & HODGES, for the plaintiffs in error.

Mr. GRANT GOODRICH, and Mr. JNO. C. PATTERSON, for the defendant in error.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

This action is upon a written guaranty of defendant upon a promissory note made by George E. Gardner & Co. to plaintiffs. All the principal facts are alleged in the special pleas, upon which the defense is predicated.

In substance, the fourth plea is, that Gardner & Co., being indebted to plaintiffs and others in large sums of money, on petition of plaintiffs a rule was issued out of the United States District Court that they show cause why they should not be adjudicated bankrupts, and while the rule was in force, and before any answer had been made thereunto, it was wrongfully and against the bankrupt law, and without the concurrence or consent of the other creditors, agreed between plaintiffs and Gardner & Co. that plaintiffs would not further prosecute the rule in bankruptcy—would abandon the same and all further proceedings thereunder, and, in consideration of plaintiffs' agreement in that behalf, Gardner & Co. executed the note which is the basis of this action, and procured defendant to guaranty its payment.

The fifth plea states substantially the same facts, with the further averment that plaintiffs did not, at any time, dismiss the proceedings in bankruptcy, or cause them to be ended, and avers that, therefore, the consideration of the note has wholly failed.

The sixth plea avers the note was given with the agreement plaintiffs should dismiss the proceedings in bankruptcy against Gardner & Co.; that plaintiffs never dismissed such proceedings, and hence the consideration has wholly failed; and in the seventh plea it is averred that, since the bringing of this suit, plaintiffs themselves have been adjudicated bankrupts, and an assignee appointed.

Issues were joined upon all these several pleas, as well as others, and the cause tried before a jury, who, upon the evidence, found for defendant. It is sought to reverse the judgment for the sole reason the verdict is contrary to the law and the evidence. No other error is relied upon.

The decision might, with propriety, be placed on the ground the verdict should be regarded as conclusive of the controverted facts. The distinct issue was made on the sixth plea, that the note was given with the agreement plaintiffs would dismiss the proceedings in bankruptcy; that they never did dismiss the proceedings, and hence the consideration wholly failed. On this issue, it seems to us the evidence preponderated in favor of defendant. In addition to the oral testimony, it was stipulated, in writing, that the proceedings in bankruptcy should be dismissed, and the written evidence is certainly of a conclusive character. It may be, the testimony of plaintiffs' attorneys was, in some degree, discredited in the minds of the jury, on account of the fact they were both witnesses and counsel in the case; but the weight to be given to the testimony was a question with them, and we do not feel at liberty to reverse or supervise their finding on such a question.

But there is another view that might be taken, that is fatal to any recovery by plaintiffs. The whole transaction is in-

hibited by the policy of the law, and no court will lend its aid to enforce an executory contract founded upon an illegal consideration. The inference is warranted, we think, that the bankrupt proceedings were instituted to compel Gardner & Co. to secure plaintiffs' claim on them as a mere means of enforcing collection.

It is insisted, our Bankrupt law is unlike the English statute in this, that it contains no prohibition against composition with the debtor during the pendency of the rule to show cause why he should not be adjudicated a bankrupt. That, it is apprehended, can make no difference. Independently of the question whether the statute, by any positive provisions, makes a composition with the debtor, pending the rule to show cause in bankruptcy, illegal, it is void on the ground of its being an abuse of the process of the law, which the creditor has the right to sue out, not only for his own benefit, but for other creditors. The reasoning of the English cases on this question is, that compositions of this character are illegal and void, by the general policy of the law, against other creditors. *Davis* v. *Holding*, 1 Meeson & Wells. 159; *Ex parte Thompson*, 1 Ves. Jr. 157.

Proceedings in bankruptcy are often harsh, and sometimes disastrous to the debtor. A creditor who seeks to use the remedy given by the law, for his own benefit as well as other creditors, should be required to proceed with the utmost fairness, and with a due regard to the rights of all parties concerned, including the debtor himself. He ought not to be permitted to use this extraordinary power to compel the debtor to secure his claim or suffer the disastrous consequences of being thrown into bankruptcy, and contract, when his own claim has been secured, to dismiss the proceedings, to the detriment of other creditors. This is what is called an abuse of the process of the law, and all contracts thus obtained are illegal and void, as being inhibited by a sound public policy, even between the debtor and the composition creditor, as well as to other creditors.

The judgment is in accordance with both the law and the evidence, and must be affirmed.

Judgment affirmed.

CITY OF ROCK ISLAND

v.

SOPHIA C. VANLANDSCHOOT.

NEGLIGENCE. In a suit against a city for damages occasioned by reason of a defect in the street, whereby plaintiff was thrown from a wagon and injured, it appeared that the driver of the wagon in which plaintiff was, was drunk, and drove so carelessly as to cause the accident, and that the defect in the street was not such as to be dangerous to a person exercising ordinary care, it was *held*, that a verdict for near $4000, against the city, should have been set aside.

APPEAL from the Circuit Court of Rock Island county; the Hon. GEORGE W. PLEASANTS, Judge, presiding.

Messrs. GEST & PARKS, for the appellant.

Messrs. KENWORTHY & BEARDSLEY, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was case, in the Rock Island circuit court. The plaintiff, Sophia C. Vanlandschoot, complained of the city of Rock Island, that a walk across Illinois street, half way between Washington and Eagle streets, constructed of rough rock, dirt and rubbish, with ruts and holes on both sides, by means whereof, the plaintiff, driving along the street, with due care, was thrown out and injured.

The jury found for the plaintiff, and assessed her damages at three thousand six hundred and seventy-five dollars. The court denied a motion for a new trial, and rendered judgment on the verdict, to reverse which the defendant appeals.

There is much conflict in the evidence, rendering it some-

what doubtful if the crossing in question was in a condition so dangerous as to jeopard the life or limb of any person using ordinary care. We are inclined to think the evidence shows that the driver of the wagon, in which the plaintiff was seated, did not use that care a reasonably careful man would exercise in going over a crossing constructed as this was, with a two horse wagon. The weight of the evidence is, he went over at a brisk trot. Again, it is proved to our satisfaction, the seat of the wagon, which the plaintiff occupied, had no fastenings to hold it to the body of the wagon, or if so provided, they were not applied, thereby making the seat quite liable to be thrown off on encountering a slight obstacle.

The driver of the wagon was plaintiff's husband, a hard drinker, who had been to a drinking saloon that day against the injunctions of his wife, who had charged him that day not to drink. He, himself, was the keeper of a drinking saloon near the city, and knew the streets as well as a man could who used them frequently. When the accident happened to his wife, he seemed wholly unconcerned—did not offer to assist her—did nothing for her, never made a move to help her, but turned to his horses.

The plaintiff herself, when she was lifted up and carried into the house, blamed her husband for the accident, called him careless and reckless. She further said of him, "you have killed me this time—you have tried to kill me, and you have killed me this time."

There can be but little doubt her husband was in a drunken condition while driving, and drove too fast over the crossing. Had he driven over it as a careful, sober man would have done, the accident could not have happened. To make the city of Rock Island pay near four thousand dollars, under such circumstances, is not in accordance with right or justice.

The crossing was not so out of repair as to render it unsafe to one using proper care, and certainly it was not so much out of repair as to charge near four thousand dollars against the

city for the negligence. We do not think the evidence justifies such finding. Considering carefully the entire testimony, we are constrained to the conclusion, it greatly preponderates in favor of appellant, both on the point of negligence of the city authorities, and on that of plaintiff's husband, who, by his careless and reckless driving, produced the damaging results to his wife.

The verdict should have been set aside, and a new trial granted. Failing to allow that motion was error, and for the error, the judgment must be reversed, and the cause remanded, that a new trial may be had.

Judgment reversed.

Mr. CHIEF JUSTICE SCOTT, and Mr. JUSTICE CRAIG, dissenting.

LEOPOLD SCHOENFELD

v.

THOMAS H. BROWN *et al.*

1. STATUTE OF FRAUDS—*promise to pay debt of another.* If the credit is alone given to the person promising to pay, the Statute of Frauds can have no application, as it only affects verbal promises for the payment of the debt, default or miscarriage of another person.

2. Where contractors to furnish materials and build a house enter into a contract with another to furnish a certain part of the materials, and the latter, after furnishing a small part of the materials, abandons the contract on account of the insolvency of the principal contractors, and the owner of the premises verbally promises to pay for the balance, and other materials are furnished on the faith of such promise to pay, it will not be within the Statute of Frauds.

3. NEW TRIAL—*newly discovered evidence.* A new trial will not be granted on the ground of newly discovered evidence, where it is merely cumulative, and not in its nature conclusive.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

This was an action of assumpsit, upon the common counts, for goods sold and delivered, brought by Thomas H. Brown and Aaron L. Brown, against Leopold Schoenfeld. The substance of the material facts appears in the opinion of the court.

Messrs. ISHAM & LINCOLN, for the appellant.

Messrs. HITCHCOCK & DUPEE, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

On the 19th of July, 1873, appellant entered into a contract with Preston, Koneman & Melick, by which they agreed to furnish all the materials and do all the work in the erection of a brick building for the sum of $13,250, to be paid to them in installments, as the work progressed, on the certificates of the architect. They sub-let a portion of the work to appellees, they agreeing to furnish the doors, windows and frames, and other "mill work" of like character for the building, for the sum of $1825, to be paid for at a time specified in an agreement then executed.

About the middle of September, appellees, having furnished about $405 worth of work, obtained from Preston & Koneman an architect's certificate they had received, calling for $400, for materials furnished by appellees. The certificate was indorsed by Preston & Koneman, and presented to appellant, and he paid the money to appellees, by a check drawn in favor of Preston & Koneman. Appellees having called on appellant for money, and not obtaining it, they served on appellant a notice that they were sub-contractors, and that they looked to him for payment, and they also filed a petition to enforce a mechanic's lien, which was still pending when this suit was tried. They also brought this action of assumpsit to recover the value of the materials delivered by them, claiming that appellant had promised to pay for them. A trial was had in the court below, and the court found for

the plaintiffs, and assessed their damages at $1394.65, for which, after overruling a motion for a new trial, a judgment was rendered against defendant, and he appeals to this court and asks a reversal.

One of the Browns, and Champion, their book-keeper, testified positively that appellant told them to go on and deliver the doors, windows and frames, and he would pay for them. Brown testified that he and his partner abandoned the contract with Preston & Koneman before they delivered any of the materials, except the $405 worth, for which they obtained from them appellant's check; and it was, as it appears, but a short time afterwards until Preston & Koneman failed, and were known to be entirely insolvent. These witnesses testify to the promise made at different times, and that it was unconditional, except as to the delivery of the materials. On the other hand, appellant denies as emphatically that he ever made such a promise.

Not seeing the witnesses testify, we are not able to judge as accurately of their credibility as the judge trying the case; but so far as we can judge from the record, we are unable to see how the court below could have done otherwise than give credence to the evidence on the part of appellees. It seems to be consistent with the circumstances shown in the case, has every appearance of truth, and, we think, decidedly preponderates over the evidence of appellant; and it has ever been the rule of this court never to disturb a verdict, unless it is manifestly against the evidence. Such is not the case here, and we think the finding of the court is fully sustained by the evidence.

It is, however, urged that the promise was within the Statute of Frauds, and was not binding, and void, as it was not in writing and signed by appellant. The test in such cases is, whether the promise is direct or collateral; and the most ready means of solving the question is, whether, in such cases as the present, the credit was given to the person making the promise or to a third person. Where the credit is alone

given to the promisor, then the statute can not have any operation, as it only affects verbal promises for the payment of the debt, default or miscarriage of another person. When a person purchases goods, or agrees to purchase, and they are delivered to him under such a promise that he will pay for them, there can be no pretense that he is undertaking to pay the debt of another. In such a case, the debt is his own, and he is, by every principle of justice, and under the most familiar rules of law, liable to pay it. The difficulty usually arises in determining to whom the credit was given, and such is the fact in this case.

Had Preston & Koneman not entered into a contract with appellees, then there could have been no pretense whatever for insisting that the statute has any application; but if appellees, for any cause, abandoned that contract, and appellant afterwards agreed to pay for the materials if appellees would furnish them, and they did not look to Preston & Koneman for their pay, then it is perfectly obvious that appellant's contract was original, and not collateral; and, all the evidence considered, we are satisfied that the court below was fully warranted in finding that the credit was given to appellant, and that appellees looked alone to him for payment. One of the appellees, and the clerk of his firm, so testified, and that the contract with Preston & Koneman was abandoned, and the court was fully warranted in giving credit to their evidence, as we have seen, in preference to the unsupported testimony of appellant.

Again, the statute rendered appellant ultimately liable for the payment for these materials. Under its provisions, appellees only had to give the requisite notice to appellant to stop payment to the original contractors, to the extent of their claims, if there would be so much coming to them, and other sub-contractors, or laborers, or material-men, did not also acquire an equal right. By the notice, they could, at all events, acquire a right to participate in the fund to be paid to the principal contractors; and this being a statutory right,

the presumption would arise that appellees, when they contracted with Preston & Koneman, did so with a view to the provisions of the statute; and if so, they did not give the sole credit to them, but in part, and as an ultimate remedy, to appellant. The material was to be, and was, placed in his building, and became a part of his real estate, and he has alone derived all of the benefit from its use. The first contractors, therefore, to a limited extent, and upon the terms of the statute, became *quasi* his agents. We should, therefore, give the Statute of Frauds a less rigid application than had appellant had no interest in, or benefit growing out of, the contract. Appellant must have known the terms of the Statute of Liens, and could have so made his agreement with the principal contractors that the money paid for the erection of the building would have gone to the laborers and materialmen; but this he neglected to do, and much, if not all, of his misfortune has grown out of his own acts.

It is urged that the court below erred in not granting a new trial on account of the newly discovered evidence. It is a rule of this court, running through all of our reports, and it is founded on reason and fully fortified by abundant authority, that the court will not grant a new trial where such evidence is merely cumulative, and is not in its nature conclusive. Here, this newly discovered evidence is only cumulative, and is not in its nature conclusive. Had that evidence been introduced, and the finding resulted as it did, we are by no means prepared to say that we could, under the uniform decisions of this court, have disturbed the finding. With that evidence in the record, under the finding of the circuit judge as it is, we could not say that it was manifestly against the evidence.

A careful examination of the record fails to show that there is any error in the record, and the judgment is affirmed.

Judgment affirmed.

MOSES STRAUS *et al.*

v.

FERDINAND MINZESHEIMER.

1. LAW AND FACT—*delivery and change of possession on sale.* If there is evidence tending to prove a delivery and change of possession of goods on a sale before the levy of an attachment, it is a question of fact for the jury to determine whether there was a delivery and change of possession, and not a mixed question of law and fact.

2. DELIVERY—*as against attaching creditor.* If a party purchase an entire lot of cigars of another, and the vendor, after receiving payment, takes the purchaser to the factory, and says: "Here are your cigars," handing to him several boxes, and the purchaser pays for the stamps to go upon the boxes, and employs the hands in charge of the factory to stamp them, in accordance with the laws of the United States requiring this to be done before removal, this, being as complete a delivery as the vendor can make, will be sufficient to pass the title as against an attaching creditor of the vendor.

3. SALE—*whether in violation of revenue laws of the U. S. requiring stamping.* A sale of a lot of cigars at the factory where made, before they are all boxed, or any of them stamped, and delivery of possession, will not be invalid between the parties, under the act of Congress imposing a forfeiture for selling, or offering to sell, cigars before they are boxed and stamped, where the contract of sale provides that they shall be stamped as the law requires, before their removal.

4. SAME—*when completed so as to pass title.* In a contract of sale, the title will pass to the purchaser, if such is the intention of the parties, although measuring or weighing is to be had at a subsequent time, in order to ascertain the amount to be paid.

5. If an entire stock of cigars is sold, the parties estimating them at a given number, for a fixed price, which is paid, and all is done that can be done to deliver possession at the factory where they are, the counting, boxing and stamping will not be necessary to pass the title as against an attaching creditor of the vendor.

6. INSTRUCTIONS—*should be based upon the evidence.* The want of evidence upon which to base an instruction is sufficient to justify its refusal. The evidence should be fairly sufficient to raise the question involved in the instruction.

7. SAME—*assumption of disputed fact.* An instruction which assumes the existence of a material disputed fact, is properly refused.

8. ESTOPPEL—*acts must influence conduct of another.* The silence of a party in asserting his claim of ownership, after a levy upon property has been made under an execution against another, will not estop him from afterwards asserting his rights, as his conduct in such a case does not induce the levy, by causing the officer to believe he is not the owner.

APPEAL from the Circuit Court of Cook county; the Hon. LAMBERT TREE, Judge, presiding.

This was a suit in trespass, brought by appellee, Minzesheimer, against appellants, to recover damages for the taking of 10,700 cigars, to which Minzesheimer claimed title under a purchase from one Regina Blumenthal, the cigars having been levied upon and sold by appellant Ayars, a deputy sheriff, under a writ of attachment in favor of appellants Strauss and Sawyer, against Regina Blumenthal and one Schloss, her partner.

The record shows the following facts:

In 1872, Minzesheimer was in partnership with J. W. Schloss and Regina Blumenthal, in the cigar business, in Chicago, under the firm name of F. Minzesheimer & Co. This firm dissolved October 16, 1872, and the business was continued by J. W. Schloss and Regina Blumenthal, under the name of J. W. Schloss & Co. The new firm became indebted to Strauss & Co. in the sum of about $800. Regina Blumenthal lived in New York, and the business was conducted by Schloss, in Chicago. Julius Blumenthal, husband of Regina, came to Chicago, acting under a power of attorney from his wife, and dissolved the firm, Blumenthal taking the assets and agreeing to pay the firm debts. Blumenthal took charge of the firm assets, including cigars, tobacco and fixtures at store No. 39 South Canal street, and the cigars in controversy at factory No. 39 Waller street. Blumenthal was to take charge of the cigars as soon as they could be packed and ready to be stamped. Before they were packed or stamped, and on the 2d of January, 1873, Minzesheimer claims to have bought the cigars of Blumenthal. The alleged sale was made at 283 West Lake

street, a mile and a half from the cigars at 39 Waller street. Minzesheimer had never seen the cigars. He paid $428 for them, and received a written memorandum of the sale. Blumenthal was to deliver them January 4, 1873. He was a brother-in-law of Minzesheimer. On the morning of the 4th of January, Minzesheimer, who was to pay for the stamps, purchased them, and went, with his son and Blumenthal, to the factory, with two wagons. Blumenthal pointed to the cigars, gave Minzesheimer several boxes, saying: "Here are your cigars." Minzesheimer looked them over, and they began stamping. Schloss' foreman, in charge of the place, then offered to stamp them, with the aid of a boy, and have them completed by 4 o'clock, which was assented to, and Minzesheimer and Blumenthal then left. About 4 o'clock of the afternoon, Minzesheimer and Blumenthal came back, but, in the meantime, the levy had been made under the attachment writ, in favor of appellants Strauss and Sawyer, against Schloss & Co. Verdict and judgment were for plaintiff, and defendants appealed.

Mr. J. L. HIGH, for the appellants.

Mr. J. S. GRINNELL, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

It is assigned for error, that the verdict is unsupported by the evidence, and that the court erred in giving and refusing instructions.

It is claimed that the alleged sale of the cigars to Minzesheimer was invalid, as being fraudulent as against creditors.

We are entirely satisfied with the correctness of the finding of the jury in this respect. We do not see how they could, under the evidence, have found otherwise.

The sale is further claimed to be invalid, because there was no delivery of the cigars to Minzesheimer, and no change of possession.

This is the chief point of controversy.

We think it may be inferred, from the evidence, that 39 Waller street was the place where the firm of J. W. Schloss & Co. manufactured its cigars; that everything there belonged to that firm, although the license was taken in the name of J. W. Schloss; and that there was nothing at Waller street but these cigars, more than half of which were boxed.

On January 4, 1873, Blumenthal, having previously sold the cigars to Minzesheimer and received the pay, took Minzesheimer to the factory, at 39 Waller street, showed him the cigars, saying: "Here are your cigars," and handing to him several boxes of them. Blumenthal paid the employees at the factory. Schloss gave him an order for the revenue stamps, which was necessary because of the license being in the name of Schloss individually. Minzesheimer paid for and obtained the requisite stamps, and commenced the work of stamping the cigars. The foreman suggested that, as it would take some time to complete the stamping, he, with the boy there, would attend to it, and have them ready on Minzesheimer's return in the afternoon. Minzesheimer gave the foreman a dollar to purchase some bay rum, with which to flavor the cigars.

During Minzesheimer's absence, the cigars were attached. Both Schloss and Blumenthal had done all they could do to complete the delivery of the property to Minzesheimer. The evidence fails to show that, after the alleged delivery to Minzesheimer, they exercised any control over the cigars, or were in possession thereof. Minzesheimer had commenced to stamp the cigars, and left an agent to complete the same. He would seem to have been the ostensible, as well as real, person in possession.

True, the cigars had not been actually removed, but this could not have been done before stamping, without violating the Revenue Law. Everything had been done, so far as respected the rights of the parties, as between themselves and their power to do so, to vest the complete title in, and to

perfect the delivery to, Minzesheimer. The stamping required before removal, concerned alone the United States government, and that Minzesheimer undertook to do.

We think, from such facts, it is not to be asserted that the jury were not warranted in finding that there was a delivery of the cigars to the vendee, and a change of possession.

The objection taken to the instructions given for the plaintiff is, that they assume that the question of delivery is solely a question of fact for the jury, whereas it is a mixed question of law and fact; and that where, as in this case, the facts show no immediate, continuous or exclusive change of possession, the court should have instructed the jury that the title had not passed as to creditors. But this is on what we regard as a mistaken assumption. We find that there was evidence tending to show a delivery and change of possession. In such case, it is for the jury to determine, from the evidence, whether they occurred or not.

It is objected that there was error in refusing these three instructions, asked by defendant:

"1. The jury are instructed that, under the Revenue laws of the United States, Blumenthal could not lawfully sell, nor could the plaintiff lawfully buy, the cigars in question, until they were properly boxed and stamped with the United States revenue stamps, as provided by law, and that any sale or attempt to sell the cigars until so boxed and stamped, rendered the cigars liable to forfeiture to the United States, and the parties liable to a fine of not less than $100 nor more than $1000, and to imprisonment not less than six months nor more than two years.

"2. If the jury find, from the evidence, that the alleged sale of the cigars by Blumenthal to plaintiff was made with a view to defraud or hinder the creditors of J. W. Schloss & Co., and that the plaintiff knew, or had reasonable cause to know, of such intention, then the plaintiff, as against such creditors, could acquire no title to the cigars, even had he

obtained possession and control thereof, and the defendants were justified in taking the same under the proceedings in attachment.

"3. The fact that the cigars in question, at the time of the sheriff's levy, were found at the factory of J. W. Schloss, one of the defendants in the attachment, and under his control, affords a strong presumption against their ownership by plaintiff, which presumption must be overcome by satisfactory evidence that the title and possession had passed to plaintiff by a *bona fide* sale, before the levy of the attachment, in order to entitle plaintiff to a recovery in this action."

The first instruction we regard as inapplicable here. It was drawn in view of the act of Congress of July 20, 1868, which provides for a forfeiture to the United States of all cigars which shall be sold or offered for sale, not properly boxed and stamped, and imposes a penalty therefor. It was not here contemplated that the cigars should be sold without being boxed and stamped, but it was a provision of the contract, that they should be stamped. It was the intent that they should be stamped before removal, and Minzesheimer was in the course of stamping them preparatory to their removal, when they were attached. Under such circumstances, we can not think that the relative rights of the parties are to be affected by this act of Congress, so as to invalidate, as between themselves, their contract of sale, because of a supposed violation of the act.

As regards the second refused instruction, without entering upon any discussion of its correctness, abstractly considered, we find it sufficient to say, that, in our opinion, the court was justified in its refusal to give it, on the ground, if no other, of the want of evidence upon which to base the instruction. From an examination of the testimony, we fail to discover enough of evidence that the sale was made with a view to hinder or defraud creditors, and still less that the purchaser knew of any such intention, to fairly raise a question in those respects, and make the instruction applicable to the facts.

It was enough to condemn the third refused instruction, that it assumed the fact that the cigars were found under the control of J. W. Schloss. That was a disputed fact, and the jury should have been left free to find upon it.

It is further urged, that the court erred in its modification of the following instruction, asked by the defendants:

"3. It is a well settled rule of law, that, in sales of personal property, when anything remains to be done to complete the contract, such as ascertaining quantity or delivering possession, the title does not pass until these things are done, and if the jury are satisfied, from the evidence, that the cigars in question were in such condition, at the time of their alleged purchase by plaintiff, that something material to the contract, such as *counting, boxing, stamping, or* delivery of possession, remained undone, then, as against creditors, the title could not pass to plaintiff, and defendants are entitled to a verdict."

The words appearing in italics, viz: "counting, boxing, stamping, or," were stricken out by the court, and the instruction then given.

Counting was not necessary. Minzesheimer had purchased *all* the cigars at the factory. The amount paid, $428, was based upon the number, 10,700. There was no counting to be done, no separation from stock on hand. The boxing and stamping were not with a view to the interest of either of the parties under the contract of sale. They concerned the interest, solely, of the United States government. The stamps had already been purchased by Minzesheimer, to be affixed, and the requirement of government virtually answered.

The authorities as to when title to personal property passes on sale, where something remains to be done to the property, are not entirely harmonious. There are numerous most respectable authorities which hold that a contract for the sale of specific goods, or of goods identified, where something remains to be done to the property, will pass the title to the

property before the act be done, if such appears, by the contract, to have been the intention of the parties.

In consonance with this class of authorities, this court held, in *Graff* v. *Fitch*, 58 Ill. 374, and in *Shelton* v. *Franklin*, 68 Ill. 333, that the title to personal property would pass by a contract of sale, where such was the intention of the parties, although measuring or weighing was to be had at a subsequent time, in order to ascertain the amount to be paid.

The cigars here had been paid for; everything had been done which it was possible, under the circumstances, to do, to change the possession and make the title complete in the vendee, and there can be no doubt, from the evidence, that the parties intended an absolute transfer, and to make the sale complete and absolute, although the stamping of a portion of the cigars remained to be afterward done for government purposes only.

In view of the facts, we perceive no error in the modification of the instruction.

The point is made that Minzesheimer is, by his own conduct, estopped from a recovery. The conduct claimed as having such effect is, that Minzesheimer, on his return to the factory, made no assertion of his title or ownership of the property, and did not even speak to the sheriff, whereas he should have made assertion of his title, and warned the sheriff of the consequences of taking his property.

But when Minzesheimer returned to the factory, he found the sheriff had already attached the cigars. He did not, by any conduct, induce the sheriff to make the attachment, nor did he quietly stand by and acquiesce in the making of the levy. It had been made before, in his absence. The cigars were attached on Saturday, the 4th. On Monday, the 6th, Minzesheimer tried to find the sheriff, and failed in finding him every day for about a week, when he saw him and demanded the cigars. He also, at the same time, demanded them of Strauss & Sawyer. We do not perceive that he assisted to deceive any one, or that he influenced any one, by

his acts, to believe any other person owned the property except himself. We see no foundation for the claim of any estoppel.

The judgment will be affirmed.

Judgment affirmed.

MILFORD D. BUCHANAN

v.

THE INTERNATIONAL BANK.

1. RECORDING LAWS—*as notice of incumbrance.* Although a party purchasing notes secured by deed of trust upon real estate has no actual notice of a prior incumbrance, yet if it is upon the record at that time, and at the time the deed of trust was executed, he will be bound to take notice of such prior incumbrance, and its legal effect, and whatever rights he acquires by sale under his deed of trust, will be subject thereto.

2. DEED OF TRUST—*effect of a conveyance of the equity of redemption to party secured, after he parts with the notes.* If a party, giving a deed of trust to secure the payment of notes to another, after the latter has parted with the notes for a valuable consideration, conveys the premises to the original holder of the notes, it will be subject to the trust deed, and all persons claiming under the latter will occupy no better position.

3. COLLATERAL SECURITY—*when held for other indebtedness than that for which it is specially pledged.* If a party executes an agreement to secure past and future loans, by which all collaterals given and thereafter to be given to secure the payment of specific notes for money loaned to him, are to apply generally to all notes held at any time by the party loaning, notes afterwards pledged for a special loan will not only be a security for the particular loan then made, but for the payment of all notes held by the lender, regardless of the manner in which they are secured, or their date.

4. In such a case, so far as future advances are made, the contract is in the nature of a mortgage, and will be binding between the parties for any and all advances made prior to the time of third parties acquiring an interest in the collaterals pledged.

5. CONSIDERATION—*generally.* Any act which is beneficial to one party, or a disadvantage to the other, is a sufficient consideration to support a contract.

6. SECURITY—*party may rely upon several, and enforce either.* A party loaning money under a general security, may also take special security, and rely upon either or both, and the right to determine which he will enforce, is with him, and not with the borrower, or those claiming under him.

7. ACCOMMODATION PAPER—*may be taken as a security.* If a party, taking notes as collateral security for money loaned, and for past and future advances, has knowledge that they were accommodation notes, this will be no reason why he may not enforce their payment for future advances, as against one acquiring rights after such advances are made.

APPEAL from the Circuit Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

Mr. GEORGE W. SMITH, for the appellant.

Messrs. ROSENTHAL & PENCE, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by appellant, to remove from the record and cancel two certain trust deeds, which were executed on the 19th day of January, 1871, by Alpheus C. Badger to one Rogers, as trustee, to secure the payment of two promissory notes of $6666.66 each, given by Badger, payable to the order of Samuel J. Walker, one in one year and the other in two years from the date thereof, with interest at eight per cent per annum.

To the bill, the appellee, the International Bank, filed its answer and cross-bill, in which it prayed that a decree might be rendered ordering the premises described in the trust deeds, which were given to secure the two notes from Badger to Walker, be sold, and the proceeds of the sale paid to the bank to the full amount of the two notes and interest, or so much thereof as should be realized upon a sale of the premises.

Upon the hearing, the court entered a decree dismissing appellant's bill, and ordered the premises sold as prayed for in the cross-bill, and that the proceeds of the sale, to the

amount of the two notes and interest, should be paid to appellee, and the balance to appellant.

To reverse the decree, appellant has brought this appeal.

The two trust deeds given by Badger were at once placed upon record, and, on the 21st of January, 1871, Walker borrowed of appellee $9500, and to secure the payment of the money, he transferred to appellee, as collateral security, the two notes executed by Badger, which were secured by the two deeds of trust.

The $9500 debt was subsequently reduced to $8000. This amount, together with the interest upon it, appellant concedes appellee is entitled to have paid by a foreclosure of the two deeds of trust, while appellee claims the right to have the balance of the two notes secured by the trust deeds applied on other indebtedness due from Walker to it, under an agreement executed by Walker, as follows:

"CHICAGO, *July* 7, 1869.

Whereas, the undersigned has heretofore, and intends hereafter, to borrow money from the International Mutual Trust Company, on his own note or notes, or the note or notes of H. H. Walker; and whereas, to secure the payment of such note or notes he has heretofore, and intends hereafter, to deposit collateral securities; and whereas, such collaterals were given and are hereafter to be given to secure the payment of specific notes; now, therefore, for the purpose of more fully securing the said International Mutual Trust Company, I do hereby agree that all and singular the collaterals by me given, or to be given as aforesaid, shall, of the option of said International Mutual Trust Company, apply generally to all notes held at any time by said trust company, executed by me or said H. H. Walker, and shall also apply and be considered collaterals to secure the payment of any and all notes negotiated for my account, by said trust company.

SAMUEL J. WALKER."

There had been a large amount of dealing between Walker and appellee, and at the time of the trial, appellee showed an

indebtedness against Walker of over $2,000,000, which appeared from various promissory notes. Among others were two dated December 30th, 1871, one for $10,000 and the other for $16,740.

It also appears that, on the 27th day of March, 1872, Badger, by quit-claim deed, conveyed the premises in controversy to Walker, which was recorded on the 16th day of May, following. Prior to this, however, Walker, on the 23d day of February, 1872, conveyed the premises by general warranty deed to one Kinney, which deed was recorded Aug. 13, 1872.

On the 23d day of March, 1872, Kinney conveyed by trust deed to Rogers, to secure three notes of $6666.66 each, given to Walker. This deed was recorded on the 26th of March, 1872.

On the 7th day of May, 1872, the Commercial Loan Co., through appellant, its cashier, purchased the notes given by Kinney to Walker. On the 25th day of April, 1874, after the note given by Kinney to Walker was due, on default of payment, the trustee, Rogers, sold the premises on the trust deed, and appellant purchased the same for the sum of $5000.

While it is true, at the time appellant purchased the Kinney notes from Walker, he was informed by the latter that the premises were free from prior liens, and although he had no actual notice of the trust deeds which secured the notes held by appellee, yet these trust deeds being upon the record at the time Kinney derived title, and at the time he executed the notes and deed of trust under which appellant claims, he was bound to take notice of the existence and legal effect of the prior deeds of trust upon the premises, and whatever rights he acquired under the Kinney deed of trust, were subject to those first given and placed upon record.

The registry laws would be useless, unless subsequent purchasers were bound to take notice of the existence of a deed previously recorded, and although appellant may have been an innocent purchaser in fact, he can not be so regarded in

law. He had no right to rely upon the representations of Walker in regard to the title to the premises, and if he saw proper to do so without consulting the record, which was open to his inspection, it was at his own peril.

At the time Walker obtained a deed of Badger, he had parted with the title to the notes and trust deeds Badger had previously given. They were held by appellee, and hence Walker occupied no better position than an entire stranger to the transaction would, had he purchased of Badger. The conveyance could not have been made otherwise than subject to the trust deeds held by appellee. Kinney, being a grantee of Walker, and appellant claiming under Kinney, could occupy no better position.

Then the only real question involved in the case is, whether, under the contract executed by Walker on the 7th day of July, 1869, appellee is entitled to hold the Badger notes as security for any indebtedness of Walker other than the $9500 debt, for the payment of which these notes were specially pledged on the 21st day of January, 1871.

By the terms of the contract executed by Walker, he expressly agreed that any and all collaterals which he had or should pledge to appellee to secure the payment of specific indebtedness, should be held and applied by appellee generally, to the payment of any and all such notes as appellee might hold against Walker at any time.

The contract was one for the security of prior and future advances by the pledge of collateral security. A collateral then or thereafter pledged for the payment of one note, under the terms of the agreement, could be held not only as security for the payment of that particular note, but for the payment of all notes held by appellee against Walker, regardless of the manner in which such other notes might be secured, or the date they might be given.

In so far as the security of future advances was concerned, the contract was in the nature of a mortgage, and we perceive no reason why, as such, it would not be binding between

Walker and appellee for any and all advances made prior to the time, at any rate, that third parties should acquire an interest in the collaterals which would be pledged, unless the contract is liable to be defeated and rendered nugatory in the manner insisted upon by appellant, which we will now consider.

It is urged by appellant, first, that there was no consideration for the agreement. It is true, a contract, to be binding, must be based upon a consideration, but we understand that any act which is a benefit to one party, or a disadvantage to the other, constitutes a sufficient consideration to support a contract. *Burch* v. *Hubbard*, 48 Ill. 164.

The money advanced to Walker as a loan could not be regarded otherwise than beneficial to him, and it is unreasonable to presume the money would have been loaned, had it not been for the agreement. The fact that appellee may have taken security for each loan made, in addition to this agreement, does not in the least tend to establish the fact that the loan was not also made on the faith of the contract; in fact, no other object can be imagined for accepting the contract.

The law does not require a party to rely alone on one kind of security. A claim may be secured in as many different modes as the parties may agree. It is not unusual to see a claim secured at the same time by personal security and real estate, and the holder of the indebtedness may resort to the land, the personal security, or both, to compel payment or satisfaction of the debt.

We are, therefore, of opinion that the loans made by appellee to Walker answer fully the objection that there was no consideration for the contract.

The testimony introduced shows that appellee, in its transactions with Walker, was acting under and in pursuance of the contract. Mr. Loewenthal, in his evidence, says: "They (the Badger notes) were deposited as special, to secure those notes, as heretofore stated, and they were also, under an agreement existing between the bank and Mr. Walker, to be held

as general collateral for any and all indebtedness from Mr. Walker to the bank."

It is, however, claimed that the contract of July 7th, 1869, is a mere option, and that the evidence fails to show that appellee elected to hold the collaterals for Walker's general indebtedness prior to the filing of the cross-bill.

We do not regard the contract as optional, in the sense that term is ordinarily used.

Under the contract, appellee had the choice to rely upon the collaterals to secure the general indebtedness of Walker, if it saw proper. That choice it has elected to exercise, and neither Walker, nor those claiming under him, had the power to annul or abrogate it.

The option that was vested in appellee under the contract was similar to that of a mortgagee, who may rely upon the mortgage if he desires, or proceed directly against the maker of the note, and enforce payment in that manner, without regard to the mortgage security.

It is also urged by appellant that the Badger notes transferred to appellee were accommodation paper, and hence nothing more can be collected upon them than the amount for which they were negotiated by Walker.

It does not appear that appellee, when it purchased the notes, had any knowledge that they were accommodation paper; but even if it did, such fact could not change the result. If appellee had the right to hold the notes as security for future advances, as well as for the debt for which they were specifically pledged, as they undoubtedly had, under the contract of July 7th, 1869, then the proof shows that the amount for which the notes were held by appellee exceeded the amount of the Badger notes.

In any view we have been able to take of the facts presented by the record, and the law arising upon these facts, the decree rendered by the court below was correct, and it will be affirmed.

Decree affirmed.

FELIX K. MISCH

v.

JAMES MCALPINE *et al.*

1. PRACTICE—*leave to file additional pleas.* Leave should be given to a defendant who has pleaded the general issue, to file additional pleas, where it appears that an additional plea is indispensable to enable the defendant to make a legal defense, and he has been guilty of no culpable negligence in asking for such leave.

2. AMENDMENT—*terms imposed by the court must be just and reasonable.* Under the statute, amendments are to be allowed upon such terms as are just and reasonable, in the discretion of the court; but such terms must not be so onerous as would practically amount to a deprivation of the right secured by the statute.

3. It is error to require as a part of the terms upon which an amendment may be made, that the party asking leave to amend will not ask for a continuance of the cause, when it appears that he could not submit to such terms without abandoning his defense.

4. Such terms imposed under such circumstances are unreasonable and amount to a denial of an opportunity to make a legal defense.

APPEAL from the Superior Court of Cook county; the Hon. JOSIAH MCROBERTS, Judge, presiding.

Messrs. ELDRIDGE & TOURTELLOTTE, for the appellant.

Mr. W. O. ROBINSON, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The declaration in this case was upon a promissory note, to which defendant, in the first place, filed the general issue, together with his own affidavit of merits as to his defense. At a subsequent term, and before the cause was called for trial, defendant entered a motion, in writing, for leave to plead specially, setting up fraud in obtaining the note, that it was given without consideration, and that plaintiffs, before they received it, had notice of such fraud and want of consideration.

The affidavits of defendant and Reed, made in support of the motion, showed clearly the necessity for additional pleas, and that there had been no culpable negligence in not asking for leave at an earlier day to file them; but the court refused to allow the motion to plead further, except upon condition defendant would not ask for a continuance of the cause. Without abandoning his defense, defendant could not submit to the terms imposed, and thereupon the court overruled the motion. A motion was subsequently made, based upon an affidavit, for a continuance of the cause, which the court overruled, and compelled the defendant to go to trial. Plaintiff recovered the amount of the note, and from that judgment defendant prosecutes this appeal.

Under the liberal provisions of the Practice Act in this State, we are of opinion the court ought to have permitted defendant to file additional pleas, and that the refusal was error. Our present statute is much more comprehensive than the former one upon this subject. It allows amendments in civil cases at any time before final judgment, "either in form or substance, in any process, pleading or proceeding, which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense." R. S. 1874, p. 778, sec. 24.

In this case, the affidavits in support of the motion show, it was indispensable, to enable defendant to make a legal defense, that leave should have been given to file additional pleas. His alleged defense was not available under the former plea, and unless leave was given to present others his defense would be entirely cut off.

Such amendments, however, are to be "allowed upon such terms as are just and reasonable," within the discretion of the court. But such terms, in the language of the statute, must be "just and reasonable," and not so onerous as would practically amount to a deprivation of the right secured by the statute.

The conditions imposed by the court in the case at bar, under the circumstances, were unreasonable, and, in fact, amounted to a denial of an opportunity to make a "legal defense." Had defendant agreed to abide the terms suggested, it would have deprived him of testimony necessary to his defense, and the privilege to file his pleas would have been of no benefit to him. It appears, from the affidavit of defendant in support of the motion for a continuance, that he could not, with safety, have proceeded to trial at that term of the court, on account of the absence of a witness, whose testimony was all-important to the defense proposed to be made. It is shown, defendant had omitted no reasonable effort to procure the attendance of the witness, but that he was absent from the State by the advice of a physician, on account of his health. The affidavit was full and complete, and made a clear case for a continuance of the cause. Had the court allowed the additional pleas, plaintiff could have avoided a continuance of the cause by admitting the affidavit or the testimony of the absent witness, and, if not true, disproved it by other testimony. This was his privilege under the statute, and this is the course that ought to have been adopted if plaintiffs were unwilling the cause should be continued.

There is nothing in this record that indicates any such extraordinary delay would ensue, as counsel suggests, had this cause been continued, before it would have been called again for trial. But no matter what delay might ensue, defendant was entitled to leave to file additional pleas, to enable him to make a "legal defense," and to a continuance of the cause on account of the absent witness. If the defense proposed to be made was true, plaintiffs were not entitled then, or at any other time, to a judgment against defendant, and it would be manifestly unjust that they should have it.

For the errors indicated, the judgment will be reversed, and the cause remanded, that defendant may have a new trial.

Judgment reversed.

JAMES ALBRECHT

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. STATUTE—*liquor law of* 1874 *a penal statute, and to be strictly construed.* The statute of 1874, relating to dram shops and intoxicating liquors, is a penal statute in its provisions, and is to be construed strictly, keeping in view the great central object in its enactment, and the evils to be prevented.

2. INTOXICATING LIQUORS—*act of* 1874 *aimed at dram shops.* Every section of the statute of 1874, the title of which is "Dram Shops," is aimed at such as keep a dram shop, not, however, with a view to their suppression; and the provisions of the sixth section do not apply to a person who treats a friend at his private house, as an act of hospitality.

3. In this case, the defendant was a brewer, engaged in the manufacture of beer, not to be sold and drank on the premises, but for sale by the quantity, and being unwell, and confined to his house, on some persons calling to see him on business, he sent for a pitcher of beer, and invited all to drink, and one of the parties did drink, whom it was alleged was intoxicated: *Held*, that the case was not the one contemplated by the sixth section of the act of 1874, and no conviction could rightfully be had against him.

WRIT OF ERROR to the Circuit Court of Bureau county; the Hon. EDWIN S. LELAND, Judge, presiding.

Mr. G. GILBERT GIBBONS, for the plaintiff in error.

Mr. JAMES K. EDSALL, Attorney General, for the People.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a prosecution, by indictment, in the circuit court of Bureau county, against Jacob Albrecht, for an alleged violation of chap. 43, title "Dram Shops," R. S. 1874, p. 438.

The title of the act, in full, is, "An act to provide for the licensing of and against the evils arising from the sale of intoxicating liquors."

The sixth section of this act provides as follows: "Whoever, by himself or his agent or servant, shall sell or give

intoxicating liquor to any minor, without the written order of his parent, guardian, or family physician, or to any person intoxicated or who is in the habit of getting intoxicated, shall, for each offense, be fined not less than twenty dollars nor more than one hundred dollars, and imprisoned in the county jail not less than ten nor more than thirty days."

The previous sections define: 1. Dram shops; 2. Provides penalty for selling without license; 3. How license may be granted; 4. The form of the license, the rights under it, and how revoked for violation of the provisions of the act, or by keeping a disorderly or ill-governed house, or place of resort for idle or dissolute persons, or by allowing any illegal gaming in the dram shop, or in any house or place adjacent thereto; 5. Provides for taking bond of the dram seller, and how suit may be brought thereon.

This statute is highly penal in its provisions, and is emphatically a penal statute, and, according to well recognized canons, must be construed strictly, keeping in view the great central object the legislature had in view in its enactment, and the evils to be prevented. The title of the act, in the revision of 1874, is "Dram Shops," and every section is leveled against them, with a view not to their suppression, for they are licensed to sell intoxicating liquors, and pay large sums of money into the town or county treasury for the privilege. The provisions of the act are aimed at such. What, then, under this view of the statute, should be the construction to be put on the sixth section? Can it be, should it be, other than this: that whoever, keeping a dram shop, shall, etc. ?

The leading facts in this case are: that the defendant was the owner and operator of a brewery, selling the manufacture by the keg or barrel to any one who wished to purchase, and for the privilege he became liable to pay to the government of the United States large sums of money, demanded by the internal revenue laws, to be appropriated to the payment of

our government debt. He kept no dram shop, nor did he sell his beverage by the small, to be drank on his premises.

One day, about the last of July or first of August, 1874, Charles Dewey, the person to whom it is alleged defendant sold or gave one or more glasses of beer, came to see defendant, who was then in bad health and nearly blind, lying on a lounge in his house, apart from his brewery, for the purpose of getting a renewal of a lease of some lots at Ohio station, on which he had erected a hay press. He was accompanied by Mr. Kyle, an attorney at law, who was wanted by Dewey to draw the papers. When Dewey and Kyle reached the house, and found defendant in this condition, they also found Andrew Ross there, and Samuel Connor, the principal witnesses for the prosecution. Ross' business there, he being a preacher, was to aid Connor in purchasing some lots of defendant, and to see about the two lots on which Dewey had his hay press, for the purpose of building a mill upon them. Ross had talked about this with defendant, when Kyle and Dewey came in. Dewey wanted to buy the lots, as it would be expensive to move his press, which had cost him eighteen hundred dollars. Ross, in his testimony, says, he supposes Dewey thought he was trying to get these lots, and he got mad, and talked pretty loud, and was "a little boozy." Connor, on his cross-examination, says, he wanted to buy some lots; Kyle and Dewey came in and went off together; Dewey was considerably excited; he thought he would lose considerable in moving his press, and was much excited at Ross. On his direct examination he says, Dewey seemed a little tight—was intoxicated; called for beer twice; some person went into another room and brought it out, and set the beer and glasses on the table, and all were invited to partake. Ross being a preacher, of course declined, never having drank intoxicating liquors. Connor never drank anything intoxicating, and never was drunk.

The opposing testimony of Kyle, Dewey and defendant, shows quite conclusively Dewey was not intoxicated; that

the beer was sent for to the brewery, and proffered by defendant to his visitors as an act of hospitality to neighbors and friends. Surely, it was not such an act as this the statute in question was intended to punish by imprisonment in the county jail. It has nothing of the odor of a dram shop about it, and was but a mere courtesy, which this law was not designed to reach.

If one invites his friends to dine with him, and generous wine, which cheers the heart, is pressed upon the guests, one of whom happened to be excited with wine when he came there, is the host to be incarcerated for giving to this most bibulous guest an additional glass? We do not think the statute should bear such a construction. The culture of the grape is recommended by the moralist and the economist, and the expression of its juices into wine. Would it be held an offense, punishable by fine and imprisonment, should the vintner, from his wine press, fill a flagon and serve it to his guests in his own house, at his table? Where is the difference in a brewer presenting a tankard under similar circumstances? We can not believe this law was designed to punish such acts.

The testimony, we think, is quite sufficient to show, Dewey, though highly excited at what he believed to be the interference of Ross to get these lots, was not intoxicated. He swears positively he had drank, during the day and before dinner, but three or four glasses of beer, and that he was not intoxicated in the slightest degree. There is not the slightest proof Dewey was in the habit of getting intoxicated.

A jury was waived in this case, and we think the finding of the court was against the clear preponderance of the evidence, and the case made was not one contemplated by the sixth section of chap. 43, title "Dram Shops."

The judgment must be reversed.

Judgment reversed.

ISAAC WILSON

v.

JAMES McDOWELL.

1. CONVEYANCE—*whether a security for the payment of money.* Where a deed of trust has been foreclosed by a sale under its provisions, and the fee vested in the *cestui que trust*, a party purchasing from him afterwards can not be considered as having purchased the deed of trust to be held as security for the money expended in such purchase, although he may have made a verbal promise to the grantor that he would purchase the land and convey it to him upon repayment to him of all money expended.

2. Nor can the purchaser, under such circumstances, be treated as the agent of the grantor in the deed of trust, in making such purchase, and as holding the title as a trustee.

3. When a verbal contract is set up to overcome and defeat a deed, loose, indefinite and unsatisfactory evidence will never be sufficient; it must be clear and convincing in its character.

4. STATUTE OF FRAUDS. Land was sold under a deed of trust and conveyed to the purchaser, and by such purchaser conveyed to a third party. Afterwards, the grantor filed a bill against said third party seeking to redeem, alleging that he had, before purchasing, made a verbal agreement with the grantor in the deed of trust, that he would make such purchase and convey the land to the complainant upon certain terms stated in the bill: *Held*, that such an agreement, if made, was within the Statute of Frauds and Perjuries.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding.

Mr. JOHN CLARK, and Mr. D. L. MURDOCK, for the plaintiff in error.

Mr. N. J. PILLSBURY, for the defendant in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a bill filed in the Livingston circuit court, by appellant against appellee, to be permitted to redeem certain lands situated in that county. The venue was changed to Will county. The bill alleges that appellant was the owner

of the lands, and being indebted to one Willard in the sum of $1500, he gave to one Pierce a deed of trust, with power to sell the lands, if he should make default, and pay the debt and interest. This deed was executed on the 19th of April, 1860, and default having been made, the lands were sold by the trustee in pursuance of the power in the deed, and Willard became the purchaser; that afterwards, on the 19th day of October, 1861, Willard and wife conveyed the premises to appellee, and he has occupied the greater portion ever since, but appellant has occupied another portion.

Appellant claims that appellee purchased from Willard under an arrangement with him and for his use, and states the agreement in his bill as follows:

"And your orator would further represent unto your honor that, on or about said first day of October, A. D. 1861, defendant, James McDowell, (he being a brother-in-law of your orator,) came to your orator and advised him, your orator, not to contest the said note and trust deed, but to buy up the same on the best terms at which they might be obtained, giving as a reason that a law suit would be expensive and uncertain; to which your orator replied that he, your orator, had no money wherewith to buy the same, and did not know where it could be obtained at that time. Whereupon defendant replied that he, defendant, had money, and that if an arrangement could be made between them, so that defendant could have the use of a part of the said land, he, the defendant, would furnish the money and buy up said incumbrance, and so save orator said land; whereupon your orator and said defendant, James McDowell, made and entered into a contract respecting the premises, in substance as follows: That defendant, on his part, should furnish the money necessary, and go to the city of Chicago and buy said claim or incumbrance, or outstanding title, in whatever form the same might be, and take an assignment or conveyance to himself as security for the money so advanced, and that your orator, on his part, should give to defendant the possession of one

hundred and sixty (160) acres of your orator's said land; and that said defendant, out of the rents and profits of said 160 acres, should pay, first the taxes on all of your orator's said land; second, the interest on the money advanced by said defendant to purchase said claim or incumbrance, and to apply the balance of said rents and profits, if any, to the payment of the money so advanced by defendant to purchase said claim or incumbrance; and it was further agreed by and between your orator and said defendant, that said defendant should receive from your orator such sums of money, and at such times as your orator might be able to pay, as payments on said money so paid out by defendant in paying said claim, and that said defendant shall keep a just and true account of all payments of principal, interest and taxes aforesaid, and of all rents and profits of said 160 acres of land, delivered to the possession of defendant by your orator, and when all said amounts were fully paid and satisfied, that then said defendant should assign, convey and release, by any proper manner, the title of said land to your orator, and deliver back to your orator the possession of said 160 acres, the possession of which was by your orator to be delivered to said defendant."

This agreement is most distinctly and unqualifiedly denied in the answer. Appellee sets up therein that Willard proposed to him to purchase the land, and he deferred doing so until he saw appellant, and learned from him that he had no means with which to redeem or purchase from Willard, and he then proposed to purchase the land and permit appellant to occupy one 80-acre tract with his family, and to rent him more, he paying rent therefor, and that appellant assented to the arrangement; that he thereupon purchased at $2800, which he regarded as its full value at the time, and that appellant occupied under the agreement for a number of years, without setting up any other claim.

Appellant and a number of the members of his family testify to his version of the arrangement, whilst appellee tes-

tifies to his, and is corroborated by the evidence of a number of disinterested witnesses, who swear to admissions made by appellant at various times, giving substantially the same terms as claimed by appellee. It also appears that, after appellant set up the claim to the property, appellee brought a distress for rent, and, on a trial, the issues were found for him, and the relation of landlord and tenant thus was established; that proceeding was commenced in March, 1869, and was determined, on appeal, in the circuit court of Livingston county, at the next October term.

When contracts of this character are set up to overcome and defeat a deed, the evidence must be clear and convincing in its character. Loose, indefinite and unsatisfactory evidence will never be held to suffice. In this case, when the evidence of the witnesses alone is considered, we can not say that it preponderates in favor of complainant. And when we consider the deed of conveyance was made to appellee, and the solemn finding of the circuit court of Livingston county, where the issue was fairly presented for decision, that appellant was the tenant of these lands, holding of appellee, we regard the evidence as preponderating decidedly in favor of the latter. And the evidence all considered, appellant has clearly failed to make out a case requiring the interposition of a court of equity.

But if this had not been so, still the contract was verbal, and is within the Statute of Frauds and Perjuries. Nor has he shown anything to take the case out of its operation. He attempted to prove that he had erected a tenant house on the premises, but in this he failed. It appears that appellee built the house, furnishing the material and employing and paying the workmen. As controlling this case, see *Stephenson* v. *Thompson*, 13 Ill. 186, *Perry* v. *McHenry*, 13 Ill. 233, and other cases decided by this court.

It is urged that appellee but purchased the mortgage or deed of trust, and held it as a security for the money advanced. A complete answer to this is, that there was then no debt due

to Willard from Wilson. Pierce had sold under the trust deed, and Willard had purchased the land and become the owner in fee free from the incumbrance, and when appellee subsequently purchased, he took the title in the same condition. Appellee was, so far as the evidence shows, in no sense the agent of appellant, to purchase the property, nor do we see that he became a trustee of the title.

It is urged that, to apply the Statute of Frauds, would enable appellee to perpetrate a great wrong and injustice on appellant. This might be so, if his theory of the case was the true one, but, on the contrary, appellee seems to have done all he agreed to do. He has fully performed his contract, and appellant has no right to complain. But if he had not, mere hardship, as all know, can not abrogate a positive requirement of the statute. The effect of applying the statute is to enable a party to avoid the performance of such verbal agreements. because they are made in violation of the express terms of the statute. Its application, as a general rule, works hardship, and parties, to avoid its effect, should comply with its terms.

This statute has certainly been relaxed as far as public policy can sanction. In fact, as has been well said by eminent judges, it is doubtful whether it would not have been better to have enforced it according to its letter, without, by judicial construction, making any exceptions.

The decree of the court below must be affirmed.

Decree affirmed.

THE TOWN OF PARTRIDGE

v.

JOHN SNYDER.

1. APPEAL FROM JUDGMENTS OF JUSTICES OF THE PEACE. An appeal lies from a judgment of a justice of the peace in a proceeding to recover a penalty, under sec. 58 of the act in relation to Roads and Bridges, Revised Statutes, 1874.

2. OBSTRUCTING ROADS—*proceeding to recover penalty for, is a civil action.* The proceeding before a justice of the peace to recover the penalty imposed for obstructing a road, by sec. 58 of the act in relation to Roads and Bridges, Revised Statutes, 1874, is a civil action, and not a criminal action, nor a case of a criminal nature.

3. It is an action of debt or assumpsit for the recovery of a penalty, and plainly falls within the words of the general statutory provision, that appeals shall be granted in all cases contained in the act conferring jurisdiction on justices of the peace, where the action of assumpsit or debt will lie.

4. APPEAL BOND. Where an appeal is taken by the town from a judgment of a justice of the peace, in such a case the bond should be executed by the supervisor of the town, in the name of the town, and not by the commissioner of highways.

5. SAME—*amendment.* Where, in a proceeding to recover a penalty for obstructing a road, an appeal was attempted to be taken from the judgment of the justice of the peace, and an appeal bond was executed by the commissioner of highways and approved by the justice of the peace, it was the duty of the court to permit the town to file a sufficient appeal bond.

APPEAL from the Circuit Court of Woodford county; the Hon. JOHN BURNS, Judge, presiding.

Messrs. BANGS, SHAW & EDWARDS, and Messrs. PAGE & PERRY, for the appellant.

Messrs. BARNES & MUIR, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a proceeding, commenced before a justice of the peace, by the town of Partridge, on the complaint of Wil-

liam Crank, one of the commissioners of highways of the town, to recover a penalty for obstructing a public highway. A trial was had, resulting in a verdict and judgment for the defendant. An appeal was taken to the circuit court, where, on motion of the appellee, the appeal was dismissed, from which judgment of dismissal this appeal is taken.

The main question presented is, whether an appeal lay in this case from the judgment of the justice of the peace to the circuit court.

The general statute in relation to Justices and Constables, Rev. Stat. 1874, ch. 79, confers jurisdiction upon justices of the peace "in all cases where the action of debt or assumpsit will lie, if the damages claimed do not exceed $200," and provides that "appeals from judgments of justices of the peace to the circuit court shall be granted in all cases, except on judgment confessed." In *Edwards* v. *Vandemack*, 13 Ill. 633, and *Ward* v. *The People*, id. 635, it was held, that, under a similar provision for an appeal in the former statute, this right to appeal did not apply to judgments rendered by justices of the peace in criminal prosecutions for fines or penalties, for crimes or misdemeanors; and in the latter case it was decided that an appeal did not lie from the judgment of a justice of the peace for a penalty, under the "Act to prohibit the retailing of intoxicating drinks," approved April 18, 1851. This was in 1852. The provision of the former statute, then in force, granting jurisdiction, although similar, was somewhat different from that of the present statute, it being "for all debts or demands claimed to be due, in which the action of debt or assumpsit will lie." After these decisions, the legislature, by an act approved February 9, 1853, granted the right of appeal from a justice of the peace, mayor of a city, or other officer, in all cases of fines and penalties. This last law remained until the revision of 1874, when it was repealed, (Rev. Stat. 1874, p. 1019, sec. 204,) and no provision of a like nature re-enacted.

It is contended, then, that the decisions in *Edwards* v. *Van-*

demack, and *Ward* v. *The People*, apply here in full force, and govern and are conclusive against the right of appeal in this case from the justice of the peace.

As respects its coming within the bearing of those decisions, it becomes important to inquire into the character of this proceeding, as to whether it is a criminal prosecution or for an offense criminal in its nature, or but a civil suit. The penalty sued for is under sec. 58, of the act in relation to "Roads and Bridges," Rev. Stat. 1874, p. 921, which provides, that if any person shall obstruct a public road, etc., he shall forfeit, for every such offense, a sum not less than $3 nor more than $10, and an additional sum for every day he shall suffer the obstruction to remain after notice to remove it, complaint to be made by any person feeling himself aggrieved.

Various other penalties are imposed by the act. It provides, that all suits for the recovery of any fine or penalty under the act shall be brought in the name of the town, etc.; that all fines recovered under the provisions of the act shall be paid over to the commissioners of highways, to be expended upon roads and bridges; and that justices of the peace shall have jurisdiction in all cases arising under the act, where the penalty does not exceed their jurisdiction.

In *Webster* v. *The People*, 14 Ill. 365, it was held, that actions of debt to enforce a statute penalty are not necessarily criminal prosecutions; and an action of debt for the recovery of the penalty of $100, imposed by the statute for hawking and peddling without license, was there held not to be a criminal prosecution, either in form or substance, and, as denoting it not to be such, it was remarked, that it was not an offense at common law, nor indictable under the statute; that, in form, it was an action of debt, and not a criminal prosecution; that it was not required to be brought and carried on in the name of the People of the State of Illinois, as all criminal prosecutions must be; that the violation of the statute for which the action was given was not made a misdemeanor; that no fine was inflicted, but simply a penalty imposed.

And a contrast was drawn between that case and the one of *Ward* v. *The People;* and, as marking the latter as a criminal proceeding, it was dwelt upon that the offense there was made expressly indictable by statute, and a specific fine was imposed, which might be recovered either by indictment or by action of debt; that the statute had made the offense a misdemeanor, and although the fine might be recovered in a civil form of action, yet the offense was criminal in its nature. The features which were thus considered to mark the case of *Ward* v. *The People* as a criminal action, or one of a criminal nature, will be found to be absent in the case at bar, and that it has belonging to it the circumstances which were held to denote the case of *Webster* v. *The People* to be, in contradistinction from the former, but a mere civil suit.

In *Ewbanks* v. *Town of Ashley,* 36 Ill. 177, it was said: "At common law a penalty given by statute might be recovered in either an action of debt or assumpsit, in any court of general jurisdiction; nor should such a penalty be recovered in a criminal proceeding." It has repeatedly been held by this court, that a proceeding to collect a penalty for the violation of a town ordinance is a civil suit; that such a penalty can not be recovered in any criminal proceeding. *Town of Jacksonville* v. *Block,* 36 Ill. 507; *Graubner* v. *City of Jacksonville,* 50 id. 87; *Hoyer* v. *Town of Mascoutah,* 59 id. 137.

It is argued, that the repeal, in the revision of 1874, of the act of February 9, 1853, giving the right of appeal from the judgments of justices of the peace in cases of fines and penalties, conclusively shows the intention of the legislature that there should be no appeal in such cases. In that revision are numerous acts wherein penalties are imposed for the violation of their provisions, and jurisdiction in suits for their recovery is conferred upon justices of the peace; but there is granted no right of appeal, unless the general law allowing appeals applies. It can hardly be supposed to have been the intention of the legislature to take away the right of appeal in all

those cases. In the one act concerning "Railroads and Warehouses," in the Revised Statutes of 1874, may be found no less than nine different cases where penalties are imposed, and are recoverable before justices of the peace.

In section 94 of that act it is declared: "In all cases under the provisions of this act, the rules of evidence shall be the same as in *other* civil actions, except as herein otherwise provided," thus showing that the legislature regarded all these actions given in the act for penalties, as civil actions.

It may be that the legislature, in the repeal of the act of February 9, 1853, deemed it as needlessly encumbering the statute book; that the case was covered under the statute, as now framed, by the general provision for an appeal in *all* cases before a justice of the peace.

But whatever the legislative intention in such repeal, this is a civil action for the recovery of a penalty, and is not a criminal action, nor the case one of a criminal nature.

In the same statute concerning justices of the peace, which gives them jurisdiction "in all cases where the action of debt or assumpsit will lie, if the damages claimed do not exceed $200," is the provision, that "appeals shall be granted in all cases, except on judgment confessed." This is a case of an action of debt or assumpsit for the recovery of a penalty. It plainly falls within the words of the general statutory provision, that "appeals shall be granted in all cases," and we do not know why the words should not be allowed to have their natural effect. If their generality is to have a limitation, it would seem, certainly, that they should embrace one of the cases which the same statute, in express terms, grants jurisdiction over to justices of the peace.

We are of opinion, the right of appeal from the justice of the peace existed.

It is further insisted, that appellant did not take any appeal from the justice of the peace to the circuit court, and this, because the appeal bond was executed by Crank, commissioner of highways of the town, instead of by the town of

Partridge. The bond should have been executed by the supervisor of the town, in the name of the town. *Gardner* v. *Town of Chambersburgh*, 19 Ill. 99. On leave for that purpose, appellant filed in the circuit court its appeal bond, executed in its name, by the supervisor of the town, and afterward, on motion of appellee, the court dismissed the appeal.

In *Hubbard* v. *Freer*, 1 Scam. 467, it was said: "This court has frequently decided, that when an appeal bond is adjudged to be insufficient, the statute is imperative that the circuit court shall permit a good and sufficient bond to be filed." And in *Waldo* v. *Averett*, id. 487: "But if it is admitted that the bond was ever so defective, the court nevertheless erred in dismissing the appeal; it ought to have allowed the motion of appellants to file a good bond." And in *Bragg* v. *Fessenden*, 11 Ill. 544: "And whenever a party intends appealing, and makes such an attempt at the execution of a bond, that the officer authorized to approve it accepts the bond, it is not the design of the statute that the appellant should be prejudiced by reason of any informality or deficiency in the bond." There, the agent of Bragg attempted to take an appeal for the latter from a justice of the peace, by executing an appeal bond in the name of Bragg, on the 21st of July, 1849, without having any authority, under seal, to do so. In November, 1849, Bragg executed and filed, in the office of the clerk of the circuit court, a power of attorney, under seal, ratifying the act of the agent in signing the appeal bond and taking the appeal. It was held, that the bond filed had been made good by the ratification, although it was executed a long while after the expiration of the time for taking an appeal, and that it was error to dismiss the appeal for the insufficiency of the bond.

In *Trustees of Schools, etc.* v. *Starbird*, 13 Ill. 49, there was a judgment before a justice of the peace against the trustees of schools of a certain township. An appeal bond was entered into by one of the trustees, and approved by the clerk of the circuit court. It was held error to disallow an application

to amend the bond, and to sustain a motion to dismiss the appeal; that the bond was defective, because not executed by the corporation against which the judgment was rendered, but that the court should have permitted the trustees to perfect the appeal by the execution of a bond obligatory on the corporation. It was said: "The trustee intended to take an appeal that would enable the corporation to have the case re-heard, and for that purpose executed a bond, which was approved and accepted by the clerk." The same may be said with regard to the action of Crank, the commissioner of highways, here, and the approval and acceptance of his bond. The Road and Bridge Act makes it the duty of commissioners of highways to prosecute for all fines and penalties under the act. Crank, as commissioner of highways, had made the complaint in the case. The appeal purported in the appeal bond to be taken on behalf of the town.

Under the authorities cited, the allowance of the filing of the bond executed by the supervisor in the name of the town was clearly proper, and the appeal should not have been dismissed.

The judgment will be reversed.

Judgment reversed.

HENRY G. RICHARDS

v.

ISAAC R. GREENE.

1. ERROR—*may not be alleged by party not affected.* An appellant can not allege errors which relate exclusively to a party who is not complaining, and is not before the court.

2. It is irregular to direct commissioners to set off homestead to the wife when it belongs to the husband, but when the final decree gives the homestead so set off to the husband, he is not injured, and can not assign error on such irregularity.

3. CHANGE OF VENUE. A party can not wait until a cause is on trial, and until the court has intimated an opinion on the merits of the case, from the evidence, and then obtain a change of venue.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. WILLIAMS, MCKENZIE & CALKINS, for the appellant.

Messrs. LANPHERE & BROWN, and Mr. E. H. LEACH, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Isaac R. Greene against Henry G. Richards and Mary Richards, his wife, for the purpose of having assigned and set off a homestead in a certain tract of land to the defendants, or one of them.

The complainant, Greene, acquired title to the premises by virtue of a sale under a trust deed executed by Richards to E. P. Williams, trustee, to secure a certain note given to A. C. Clay, for the sum of $1320.

At the time of the execution of the trust deed, Richards, who was a householder, resided upon the premises with his wife. The wife, however, did not join in the execution of the trust deed.

Upon the first hearing of the cause the circuit court found the homestead right to be in the wife, Mary Richards, and decreed the homestead to her.

At the September term, 1874, of this court, the decree was reversed, on the ground that the homestead should have been decreed to Henry G. Richards, and not to his wife.

At the May term, 1875, of the circuit court, the cause was again heard, and a decree rendered in conformity to the opinion of this court, to reverse which Henry G. Richards has brought this appeal.

It is urged by the counsel for the appellant, that the court

erred in denying the application of Robert Mecum, the conservator of the estate of Mary Richards, to come in and defend, and in not determining the rights of Mary Richards before final decree.

Whether any error was committed that affects Mary Richards or her rights in the premises, it is not necessary to inquire, as she is not before the court, and has made no complaint in regard to the decree.

It is a familiar principle, that the appellant can not allege errors which, if they exist at all, relate exclusively to a person who is not complaining, and is not before the court. *Henrickson* v. *Van Winkle*, 21 Ill. 274; *Horner* v. *Zimmerman*, 45 Ill. 14; *Cromine* v. *Tharp*, 42 Ill. 120.

It is next urged, that the court erred in the appointment of commissioners to set off a homestead to Mary Richards.

It is true, it was irregular to direct the commissioners to set off the homestead right to the wife of appellant. That irregularity, however, did the appellant no harm, and he can not complain of an error that worked no injury to him.

By the final decree, the homestead was decreed to appellant, and it is difficult to perceive what more he can ask. It was the duty of the commissioners to examine the premises, and to set apart a certain portion thereof, of the value of $1000, as a homestead. Whether the homestead was ultimately to be decreed to appellant or his wife, did not concern the commissioners in the discharge of their duties, and could have no effect upon the result of their labors.

It is also said, that portion of the premises set apart by the commissioners as a homestead, was not of the value of $1000, and to support this position, appellant filed several affidavits, tending to sustain his position. On the other hand, appellee filed affidavits which tended to establish that the premises set apart as a homestead were worth even more than $1000. Upon a careful examination of all the evidence presented bearing upon this point, we see nothing to impeach the action of the commissioners.

No fraud or improper conduct is charged, and, so far as we can perceive, the commissioners have acted with discretion and good judgment.

It is next urged that the court erred in overruling appellant's motion for a change of venue.

Upon an examination of the record, it appears that a trial of the cause had commenced, or was about to be commenced, before the motion was made. The term of court at which the cause was tried commenced on the first Monday of May. On the 29th day of May, when the cause was called for trial, a motion was entered, on behalf of the conservator of Mary Richards, for leave to come in and defend. This motion having been overruled by the court, then, for the first time, a motion to change the venue was entered.

The motion came too late. A party can not wait until a cause is on trial, and until the court has intimated an opinion on the merits of the cause, from the evidence, and then obtain a change of the venue.

Such a practice would lead to endless delay in the trial of causes, and it is not authorized by the statute, and can not be encouraged. *Hudson* v. *Hanson*, Sept. T. 1874.

We have given this record a careful examination, and fail to find that it contains any substantial error.

The decree will be affirmed.

Decree affirmed.

WALTER NEWLIN *et al.*

v.

WILLIAM C. SNYDER *et al.*

1. CHANCERY—*decree pro confesso against unknown heirs.* It is not error to render a decree *pro confesso* against unknown heirs, where it does not appear from the record that they were minors.

2. PRACTICE IN THE SUPREME COURT. An affidavit that the defendants, against whom a decree was entered by default in the court below, were minors, can not be filed and read in the Supreme Court. This court is bound to look at the record as it comes from the inferior court.

WRIT OF ERROR to the Circuit Court of Whiteside county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Messrs. WOODRUFF BROS., for the plaintiffs in error.

Mr. D. MCCARTNEY, and Mr. F. D. RAMSAY, for the defendants in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a proceeding in the Whiteside circuit court, by bill in chancery, to foreclose a mortgage alleged to have been executed by one Robert Newlin to the drainage commissioner of that county. The suit is by William C. Snyder, the assignee of the note, and the successor in office of the drainage commissioner, and against the unknown heirs of Robert Newlin, it being alleged that he had departed this life since the execution of the note and mortgage, and on the further allegation that the names of the heirs were unknown.

The bill was taken for confessed, and a decree of sale entered.

Walter Newlin and William Newlin, claiming to be the parties sued as the unknown heirs of Robert Newlin, bring the record here by writ of error, and allege as error, rendering a decree without proof of the death of Robert Newlin, and no affidavit was filed of the existence of heirs whose names were unknown, and that the default was improperly entered against them, they being minors.

This case is in a small compass, and the decree must be affirmed, as the record fails to show these unknown heirs were minors at the time the bill was filed and decree passed.

To obviate this difficulty, an affidavit has been filed in this court, setting out that fact. This affidavit can not be read in

this court, as we are bound to look at the record as it comes to us from the circuit court, and no extraneous matter can be incorporated. The question can not be raised here in this manner.

The decree must be affirmed.

Decree affirmed.

H. C. TODD, Trustee, etc.

v.

THE KANKAKEE AND ILLINOIS RIVER RAILROAD CO.

1. RIGHT OF WAY—*compensation to the owner in case of condemnation—how far damages and benefits to be considered.* Under the Eminent Domain law of 1852, the owner of land taken by a railroad is entitled to compensation, at all events, to the extent of the value of the land taken, without any deduction for benefits the land may receive from the location or construction of the road; but such benefits may be set off against any damage the land may sustain by the construction of the road.

2. SAME—*benefits to one piece of land can not be set off against damages to another.* The damage done to one piece of land, through which a railroad is run, can not be compensated by benefits accruing to another and separate piece of land through which it does not run, although belonging to the same person.

3. Where a town had been laid out into blocks and streets for many years, and the same had always been recognized, treated and dealt with by the owners and the people as blocks and streets so laid out, such blocks should be treated as distinct tracts of land for the purposes of assessing damages done by a railroad running through any of them, although the plat of the town may not have been made according to the statute.

WRIT OF ERROR to the Circuit Court of Kankakee county; the Hon. CHARLES H. WOOD, Judge, presiding.

Mr. HARRISON LORING, for the plaintiff in error.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The railroad company filed a petition on the 5th day of August, 1870, for the condemnation of the right of way over

the land of plaintiff in error. The proceeding was under the right of way law of 1852, and was in the county court of Kankakee county. On the filing of the petition, commissioners were appointed, and reported that appellant was entitled to one dollar for compensation, and one cent for damages for the land to be taken for right of way. Thereupon, defendant appealed to the circuit court, where, on a trial by a jury, a verdict similar to the report of the commissioners was found, and, upon overruling a motion for a new trial, the court rendered a judgment on the verdict. And the defendant brings the case to this court on writ of error.

The evidence showed that the road, as located, would run through a number of blocks in the town of Momence. There was evidence that these blocks are worth from $1000 to $4000 each. Witness Worcester speaks of six of them. And the road seems to have been located through some farm lands, which, the same witness states, were worth from $75 to $100 per acre. There was other evidence tending to prove the value of this property, at the date the proceedings were commenced for its condemnation.

On this evidence, plaintiff in error asked the court to give his eighth instruction to the jury, but it was refused. It would have told the jury that the law required they should, at all events, find and return the value of the land taken, as shown by the evidence; and that they should not deduct any benefits the land might receive from the location or construction of the road; but that they could set off benefits against damages the property might sustain by construction of the road. This is the substance of this instruction, and it is in strict accordance with the rule laid down in the cases of *Hayes* v. *Ottawa, Oswego and Fox River Valley Railroad Co.* 54 Ill. 373, and *Peoria, Pekin and Jacksonville Railroad Co.* v. *Laurie*, 63 Ill. 265, and it should have been given.

These cases hold that the owner must be paid, in money, the value of his land taken by the road, and that benefits can not be set off or deducted from that amount, but that benefits

might be deducted from damages. It was, therefore, error to refuse to give this instruction, and it was equally error to give those for plaintiff, which announce a different rule.

Again, the court should have given the 13th instruction asked by plaintiff in error. It would have told the jury, that if they believed the town of Momence had been laid off into blocks and streets in 1848 or 1849, by the owner, and has ever since been recognized, treated and dealt with by such owner and by the people of Momence, as blocks and streets so laid out, and that the same was notorious in the town since that time, then, for the purposes of assessing damages, the blocks through which the road runs should be treated as distinct tracts of land, and this, although the land was not platted in accordance with the statute, and that the jury, in assessing damages for the portion of the blocks thus taken, should not take into consideration any benefit the construction of the road would confer upon other blocks through which the road would not run.

If the proposition contained in this instruction is true, then, there can be no doubt that these blocks constituted separate and distinct parcels of land. The use of the streets, the sale and improvement of such blocks, for the length of time indicated, would, assuredly, give the public a right to the use of the streets, especially if the corporate authorities had recognized and repaired the same as public streets. But if they were dealt with—which evidently means that the blocks were bought and sold as blocks, and adjoining these streets as public highways—then, as against such purchasers or present owners, the former owner who platted the land into blocks and streets could not close the streets, or in fact any one else, without it should be by the consent of the adjacent owners. And, if this be true, then the streets permanently separated these blocks, and it was beyond the power of the owner of the blocks to again unite them, until he acquired other rights than those he then held.

As to the last proposition contained in this instruction, it

has never, so far as we are informed, been held that damages done to the piece of land through which a railroad is run, may be compensated by benefits received by another and separate piece of land through which it does not run. To so hold, would be to take a man's land and pay him with benefits to other lands, shared in common with all other lands in the vicinity. Others do not pay for such benefits, and on what principle should he be compelled to do so, when he has alone suffered damage? It has been held, under various statutes that seemed to require it, that the benefits to the land through which the road runs, may be taken into account in fixing the compensation for damages thus done. The instruction, in this respect, conforms to the decisions in the cases of *Hayes* v. *Ottawa, Oswego and Fox River Valley Railroad Co.* and *Peoria, Pekin and Jacksonville Railroad Co.* v. *Laurie, supra*, and the instruction should have been given.

For the errors indicated, the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

SETH W. HARDIN

v.

JAMES V. S. CRATE.

1. DEED—*presumption as to time of delivery.* It will be presumed, in the absence of sufficient evidence to the contrary, that a deed for land was delivered on the day it bears date, although it was acknowledged afterwards.

2. LIMITATION—*color of title.* A sheriff's deed for land sold for taxes is color of title under the limitation law of 1839, but a contract for the sale of land is not, of itself, color of title.

3. SAME—*payment of taxes while color of title remains in party acquiring it in bad faith, avails nothing.* If a party acquires color of title in bad faith, and makes a contract to sell the land to another, who pays taxes on the same before the vendor parts with his color by a conveyance, such

payments will be unavailing to the purchaser, under the limitation law of 1839.

4. But if the color of title was acquired in good faith by the vendor, then the payment of taxes by a purchaser from the original owner of the color of title, under a contract, will be good under the statute, and will enure to the benefit of such purchaser when he afterward acquires the color of title.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

This was an action of ejectment, brought by Seth W. Hardin against James V. S. Crate, for the recovery of the west half of the north-east quarter of section 13, township 33 north, range 9 east, in Will county. The defendant recovered and the plaintiff appealed.

Mr. EDMUND S. HOLBROOK, for the appellant.

Messrs. GOUDY & CHANDLER, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The facts in this case fully appear in the opinion delivered when the case was before us on a former appeal, 60 Ill. 215. The judgment was affirmed on the ground it was thought the evidence showed a complete bar to the title claimed by plaintiff, under the 9th section of the Conveyance Act of 1845. A new trial was taken under the statute, which resulted, as before, in a verdict for defendant, and from the judgment rendered thereon, plaintiff prosecutes this, his second, appeal.

On the evidence, and under the law as stated by the court, three distinct issues of fact were submitted to the consideration of the jury:

1st. Whether the deed from Bailey and Reynolds to Brower and Wynkoop was delivered on May 1st, 1841, the day it bore date, or not until it was acknowledged, in September, 1842.

2d. Whether the color of title obtained under the deed from the sheriff to Stuart was acquired in good faith.

3d. Whether defendant had actual possession of the lands for seven years before the commencement of this suit, under claim and color of title made in good faith; and whether, during that period, he paid all taxes legally assessed upon the lands.

If the jury found either of these propositions for defendant, it would defeat any recovery by plaintiff. A finding for defendant on the first proposition might show an outstanding title in the assignee in bankruptcy, as against plaintiff, and upon the second and third propositions, that a complete bar had been made out against plaintiff, under both the 8th and 9th sections of the Conveyance Act of 1845. The instructions given under the evidence would, perhaps, authorize the jury to find any or all the propositions for defendant. But the finding being general, we have no means of knowing how the jury found on the several propositions submitted. We can, with as much propriety, suppose they found one as another, and if it should appear the evidence would not support a finding for defendant as to any single proposition, or that the law applicable to the facts had been so erroneously stated as to mislead the jury, it would seem to follow there ought to be a new trial.

With regard to the first proposition, the jury were instructed that, if the deed dated May 1, 1841, purporting to be executed by Bailey and Reynolds to Brower and Wynkoop, acknowledged in September, 1842, was not, in fact, delivered until after Bailey and Reynolds had been adjudicated bankrupts, in March and July, 1842, and an assignee appointed, then they should find for defendant.

Waiving any discussion of the question of law contained in this charge, we may say the evidence as to the delivery of the deed was very slight, and it is exceedingly doubtful whether it was sufficient to overcome the presumption it was delivered on the day it bears date. But, assuming the law

was stated correctly, we should, under the rule, be inclined to hold the verdict should stand, on the ground it is the province of the jury to settle all questions of fact.

As to the second proposition, the law was given with entire accuracy, and even favorably for plaintiff. That the deed from the sheriff to Stuart was color of title, was conclusively settled by our former decision, but as to the good faith of Stuart in obtaining color of title, this record contains some additional testimony which renders that question doubtful in the extreme, if it does not establish the fact of actual bad faith. After all, it is a question of fact for the jury, upon the evidence, and as the testimony is not of a conclusive character either way, if we could know they found it for defendant, we might say, as we could as to the finding on the first proposition, it would be regarded as conclusive.

But any finding for defendant on the third proposition, under the instructions given, would be clearly and palpably erroneous, as against both the law and the evidence. The jury were instructed that, if defendant was in actual possession of the land in controversy, under claim and color of title shown by the deed from the sheriff to Stuart, made in good faith, and during that period paid all taxes legally assessed upon it, then the bar was complete under the 8th section of the Conveyance Act of 1845.

In view of the undisputed facts in this case, this instruction was highly calculated to mislead the jury, and to prevent this result, the court ought to have given the 10th instruction asked by plaintiff. Had that instruction been given, the jury would have been able to apply the law understandingly to the facts. As it was, they were without anything to guide them on this all-important branch of the case. Plaintiff asked to have the jury charged that the contract read in evidence, from Stuart to defendant, dated January 23, 1858, was not, of itself, color of title, and did not transfer the color of title that was in Stuart to defendant; that the color of title remained in Stuart until his deed to Van Fleet, dated Novem-

ber 30, 1859; and that, unless Stuart had acquired color of title in good faith, then they should disregard all payments of taxes under it, whether by Stuart or defendant, while the color of title remained in Stuart; but the court refused to so instruct. This instruction contained an expression of the law applicable to the facts, and no other given did, on this branch of the case. It was absolutely necessary, to enable the jury to render an intelligent verdict upon the evidence.

There can be no pretense defendant has shown any bar under the 8th section of the statute, unless it shall be assumed as proven that Stuart had claim and color of title made in good faith. But that was one of the contested points in the the case, and the existence of a fact so important to the defense could not rightfully be assumed.

The contract for a deed from Stuart to defendant was not, of itself, color of title, in the statutory sense of that term. The deed from Stuart to Van Fleet, for the benefit of defendant, was color of title, and was undoubtedly obtained in good faith. Of this fact there can be no controversy, and had it appeared defendant had been in possession, under this title, for seven years prior to the commencement of this action, with the superadded fact of the payment of all taxes legally assessed on the land for that period, the bar under the 8th section would have been complete. But the proof is positive he was in possession only six years under that title. It is true, he was in possession seven years, and perhaps more, but it was under the contract of sale from Stuart. During that period, the color of title remained in Stuart, and it could not be said defendant had "claim and color of title," within the meaning of the statute, unless Stuart had color of title acquired in good faith. *Darst* v. *Marshall*, 20 Ill. 234.

It may have been, upon this vital point the jury were misled by the instructions of the court. They ought to have been told, as plaintiff asked to have them, that defendant's contract with Stuart for a deed was not, of itself, color of

title, and that the color of title remained in Stuart until the conveyance in pursuance of the contract to Van Fleet.

What warrant can we have for saying the jury found for defendant on one or both of the other propositions submitted? On both of them the evidence was conflicting, and even doubtful. How can we know but they found for plaintiff on both of them, and that their verdict for defendant was in consequence of their finding on the last proposition that the bar under the 8th section was complete. The evidence would not justify such a finding, but the instructions given may have led to the belief it did. Had the jury been told the contract from Stuart to defendant was not, of itself, color of title, their verdict might have been different.

Under the facts proven, the court ought to have given the 10th instruction asked by plaintiff, and it was error to refuse it.

The judgment will be reversed and the cause remanded.

Judgment reversed.

ROBERT W. ROBINSON

v.

JOHN DAY FERGUSON *et al.*

1. TERMS OF COURT—*judgment and decree at term not authorized, void.* Where a term of the circuit court is held in March, in ignorance of the fact that the legislature had changed such term to the April following, all the judgments and proceedings had will be without warrant of law, and void.

2. But where a decree was rendered for the specific performance of a contract for the sale of land, at such a term of court, requiring the complainant to make payment of the price due, which he did before the next regular term, and the court, at the latter term, found that fact, and again decreed a conveyance to be made, under which the master executed a deed: *Held*, that the last decree was sufficient to uphold the deed and pass the title.

Statement of the case.

3. EVIDENCE—*to contradict record.* Where the record of a cause shows that a defendant appeared and answered the bill filed against him, his testimony can not be admitted to disprove the fact.

4. BURNT RECORDS—*decree establishing title.* Under the statute known as the "Burnt Record Act," where a petition is filed to establish and confirm the title to land, the court is authorized to decree in favor of the better title, in case of a dispute as to the ownership.

APPEAL from the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

This was a petition in chancery, under the Burnt Record Act, Rev. Stat. 841, sec. 16, filed by Robert W. Robinson, against John Ferguson, on the 14th day of July, 1873, in the Superior Court of Cook county, setting out the destruction of the public records of Cook county by fire, in the fire of October 8 and 9, 1871; that the complainant was the owner in fee simple of the west half of the north-west quarter of section 30, in township 40 north, range 14 east of the third principal meridian, situate in said county; that the original title deeds and instruments of writing relating to the title to the land had been lost or destroyed; that complainant's title was derived by pre-emption, made under the laws of the United States, and purchase of the land from the United States, on the 29th day of May, 1835, and possession thereof from that time until the present; that one John Ferguson claimed title to the land, which claim was null and void, and a cloud upon complainant's title. The petition prayed that the title to the land might be confirmed and established in the complainant, and that the claim of Ferguson might be declared to be void, and the cloud thereof removed.

The cause having been brought on to a final hearing upon the petition, answer and replication and proofs made, the court, by decree, found and determined that the title to the land was vested (as provided by the will of Ferguson) in the executors who were named, of Ferguson, in trust for the heirs

in the decree named, in fee simple, Ferguson having died pending the suit, and his executors having been made parties.

Robinson appealed from the decree.

In 1832, Robinson built a house upon the land, and afterward made other improvements, fencing and cultivating some 20 acres. On the 29th of May, 1835, he entered the land, at the land office at Chicago, under the Pre-emption Act of 19th June, 1834, and received from the register and receiver of the land office their certificates of his purchase and payment for the land. In 1837 or 1840, he left the land, and, as he testifies, placed it in the possession of George W. Snow, who owned the 80 east and the 80 west of it, and had ever since occupied it as the tenant of Robinson, until he (Snow) died, about 1870, leaving one John Lyon in occupancy, who has since held the possession as tenant of Robinson.

This, in brief, is the showing as to Robinson's alleged title.

The title to John Ferguson is deduced as follows:

1. A written agreement August 15, 1834, for conveyance by Robinson to H. S. Handy, on payments to be made, of the north-west half quarter, section 30, township 40 north, range 14 east of the third principal meridian.

2. An exemplified copy, from the files of the general land office at Washington, of the receiver's receipt of the purchase price of the land from Robinson, with Robinson's assignment of his interest in the land to Samuel Ressegne, purporting to be acknowledged before the register of the land office at Chicago.

3. The original patent from the United States to Samuel Ressegne for the land.

4. The special commissioner's deed of Isaac N. Arnold to Henry S. Handy, of the land, of date January 1, 1840, made pursuant to a decree in chancery for the conveyance thereof by Robinson and Ressegne to Handy, upon a bill filed for the specific performance of the agreement first above named.

5. A mortgage from Henry S. Handy and wife to Ulysses B. Brewster and others, of the land, dated August 29, 1837, to secure the payment of a note for $5698.

6. A sheriff's deed of Cyrus P. Bradley, sheriff, of the premises, to John Ferguson, made under a foreclosure proceeding by *scire facias* of the above mortgage, dated August 4, 1854.

7. A quit-claim deed of the land from Laura W. Handy and Emma I. Spink, the sole heirs of Henry S. Handy, to Henry H. Handy, dated October 25, 1859.

8. Quit-claim deed of the land, dated June 3, 1867, from Henry H. Handy and wife to John Ferguson.

Mr. EDWARD ROBY, for the appellant.

Messrs. SMALL & MOORE, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

There is exhibited by the proof a good chain of title to the premises in controversy in John Ferguson, brought down from the government, unless the objections which are taken thereto be sufficient to invalidate it.

It is objected to the validity of the deed of Isaac N. Arnold, special commissioner, that the decree under which it was made was void, because it was rendered at the March term, 1839, of the Cook county circuit court; that that term of the court was held without warrant of law.

The time of holding the spring term of the circuit court for Cook county was changed from the month of March to that of April, by an act of the General Assembly, approved March 2, 1839. The judge, in ignorance of the change having been made, held the court in March, 1839.

This court has heretofore decided that that term of the court was held at a time unauthorized by law, and that all the judgments and proceedings of the court at that term were without warrant of law, and void. The abstract of title in evidence, in

respect of the proceedings in the cause wherein this commissioner's deed was made. does show that a decree was entered March 23, 1839, that Robinson specifically perform the contract, and that he, together with Ressegne, execute to Handy a warranty deed for the land, provided Handy should, within three months, deposit with the clerk the amount due under the contract; but the abstract further shows that the records of the court set forth the payment of the money by Handy, and full compliance, on his part, with the terms of the contract, and that, on the 10th day of August, 1839, a decree was entered that the defendants in the suit execute and deliver a deed of the premises within ten days, and in default of such execution, Isaac N. Arnold was appointed a special commissioner to execute and deliver the deed.

Admitting the decree of March 23, 1839, to be void, we consider the decree of August 10, 1839, a sufficient decree for the conveyance by Robinson and Ressegne to Handy, of the land, and that it would uphold the commissioner's deed. The description of the land, in the contract with Handy, as the *north-west half quarter* of section 30, palpably means, in the light of the surrounding circumstances, the west half of the north-west quarter.

It is objected that this decree was void for another reason, that Robinson was never served with process, and never authorized any one to appear for him. He does so testify. But the record says that the defendants did appear and answer the bill; that replication was filed and testimony taken. We can not admit the statement of Robinson, to overcome this evidence furnished by the record, that he did appear.

The evidence of the decree and proceedings in that chancery suit consisted in the abstract of title which was introduced in evidence; but it seems to be conceded that the abstract was brought fully within section 29, of page 846, Rev. Stat. 1874, as well as within section 24, page 662, of

Session Laws of 1872, and so made thereunder competent evidence.

This commissioner's deed, then, of January 1, 1840, we regard as divesting both Robinson and Ressegne of all title and interest in the land which either of them had, and vesting the same in Henry S. Handy.

Various objections are taken to the sheriff's deed to Ferguson, of August 4, 1854, made under the judgment of foreclosure of the mortgage from Henry S. Handy to Brewster and others, as to its sufficiency to convey the title of Handy to Ferguson; but we shall not stop to consider the objections, regarding it as not material whether this deed was or not a valid conveyance of Handy's title, inasmuch as the heirs of Handy subsequently executed to Ferguson a quit-claim deed to the land, which amounted to a ratification of the sheriff's deed, and vested in Ferguson this Handy title.

Thus the title to the land was in Ferguson; but it is claimed by appellant that, if that be so, the title is barred by the Statute of Limitation; that he, by himself and his tenants, has been in the open, adverse actual possession and occupancy of the land from 1852 to the time of the commencement of the suit. Robinson himself does so testify, but that does not make it the fact, as seems to be assumed by appellant's counsel. His testimony is to be weighed, tested by examination as to its truthfulness, and to be received and acted upon only so far as it impresses the mind with belief in its truth.

There is much appearing to impeach the credit of appellant's testimony. He denies that he ever executed any paper writing to Ressegne, or ever had any business transaction whatever with him, although he admits an acquaintance with him, and that Ressegne was frequently at his house. The abstract shows that there were upon record various instruments of writing purporting to be executed by appellant to Ressegne—as, an assignment of the pre-emption certificate, a bond for a deed of the land, a power of attorney to act with

respect to other lands, and a warranty deed of the land in question.

The assignment, bond and power of attorney appear not to have been acknowledged, so that there is no proof of their execution by appellant, and should not be adverted to further than as a singular fact that so many forged paper writings to the same man should have got upon the record. There is no suggestion that the warranty deed was not acknowledged, and we take the execution of that as proved. There is in evidence an exemplified copy, from the general land office, of appellant's pre-emption certificate of purchase of this land, having appended to it an assignment from appellant to Ressegne. The natural conclusion would be, that the original pre-emption certificate would not have got upon the files of the general land office without having first been delivered by appellant to Ressegne.

Appellant's only explanation is, that the certificate was stolen out of his house.

Appellant testifies that he paid the taxes on the land as many as eighteen or twenty times, but does not produce a single tax receipt; says the tax receipts were stolen. The land was not taxable until 1840, and Mr. Kerfoot testifies that he, as agent for Ferguson, paid the taxes for 1852, and regularly every year afterward. So that appellant here stands contradicted as to the number of times he paid the taxes.

Appellant swears he was not served with process, and did not appear in the chancery suit for specific performance. The record contradicts him in this.

It is a remarkable fact that, with all appellant's pretended continuous care and efforts to guard and protect his right to this land, he should never have applied for his patent for it, as he admits that he did not. It appears that he had entered other lands, and obtained the patents for them. He says that for one piece of land he had lost the duplicate; that he wrote on to the general land office, and they sent him the patent; yet no measures were taken to secure the patent for this land,

of the value, as testified to, at the time of the commencement of the suit, of $120,000.

Appellant had a house which he had built upon this land in 1832, and if he had supposed that he had a right to the land, and had intended to preserve and protect it in the future, he would naturally have stayed upon the land; but about 1838, he left the land, built another house upon a piece of land some eight miles distant, in 1840, and ever since has resided upon this latter place, it being ten miles distant from the court house in Chicago.

Appellant's testimony in this regard is, that Handy tendered him the money due upon the agreement for a deed; that he refused to accept it, and then, to use his own language, "that started the quarrel right off, and what they did about it after that, I don't know. I don't bother myself at all about it. I went on and made them arrangements with Snow, and made me another home here"—the place upon which he built the house in 1840. The alleged arrangement with Snow, as testified by appellant, was a verbal permission to Snow to use the land, rent free, he to keep the fence up good, and keep it for appellant. He admits that he had received no income from the land since 1840.

The conclusion which forces itself upon the mind, from the facts, is, that appellant accepted the decree for a specific performance of his contract with Handy for the conveyance of the land to the latter, and the commissioner's deed of January 1, 1840, in pursuance of the decree, conveying the land to Handy, as a final settlement of his rights as to the land; that he thereupon abandoned it, built him another house elsewhere, and never after had any care or concern with regard to the land, until about the time of filing the present bill. No steps ever having been taken by appeal or otherwise to reverse the decree, confirms this, that he acquiesced in the result of the suit.

On the part of the defendant, Mr. Kerfoot, engaged in the real estate agency in Chicago, testified that, in the year 1852,

he became the resident agent of John Ferguson, who resided in New York, to pay the taxes on and look after the land in controversy; that he afterwards, regularly every year, paid the taxes; that he often visited the land; that it lay between two parallel eighties belonging to George W. Snow, and that Snow took a written lease from him of the land in question at a dollar a year, so that, by throwing a fence across the ends of this one, the three eighties might be embraced within one enclosure, saving him the expense of fencing two lines of this eighty; that he thinks three, perhaps four, of such leases were executed, the first one being as early as 1854. Only one could be produced, which had been found among the papers of Mr. Snow. This one was a lease running from John Ferguson, by Kerfoot, his agent, to Snow, made in 1862, for five years from that time. Witness' copies of the leases were all burned. That Snow never would take a verbal arrangement in regard to the land, and always had a written lease, giving as the reason, that he might have authority for putting his tenant of his land in possession of this eighty. There would seem to have been a temporary fence on the land before any lease was made. The witness testified that Snow told him that the temporary fence that he had put up was one for his convenience; that he was occupying the land merely as a matter of convenience to himself; that he did not hold the land adverse to any one, and then took the lease from witness; that, under that lease, he put up a more permanent fence; that witness never heard of any claim of appellant to the land, until this bill was filed.

There is some criticism indulged in as to the witness' personal knowledge of the payment of the taxes, and as to his personally paying them, he having partners with him some of the time; but, from the whole evidence upon the subject, we are satisfied that the taxes were paid as above stated by him.

It is said that, at the time of taking the written lease from Ferguson, Snow was the tenant of appellant, and could not

thus betray the possession with which he had been intrusted by appellant, and that appellant's possession still continued; but the only proof of any such tenancy is the bare assertion of the appellant. That, we do not accept as proof of the fact. There is a possibility that Snow, while being the tenant of appellant, might have obtained these successive written leases for such a series of years from Ferguson, and never have made mention of appellant's claim to the land to Kerfoot, and the latter never have heard of any adverse claim, but it is too improbable for belief.

Downing was a tenant of Snow, of his two eighties, for some six years from 1857, living thereon, and, a portion of the time, making use of the premises in question. He testifies that he never heard of any claim of appellant to the land, but understood Ferguson was the owner, and was informed by Snow that Kerfoot had the agency of it, and witness, at one time, wishing to cut some small wood upon this eighty, was informed by Snow that Kerfoot would have to be seen about it. He thinks that he did go and see Kerfoot in reference to that matter.

Snow died in 1870, and his testimony could not be had. His proven acts tell most strongly against the testimony of the appellant.

Appellant's claim of adverse possession rests wholly upon his own naked statement, without the corroboration of one single circumstance, except in the testimony of the witness John Lyon. This witness did testify that he was in possession of this eighty, and had been ever since 1866, receiving it from Mr. Snow, who leased to him his (Snow's) two eighties; that the year after he went on, appellant stopped, as he was passing by, and, after some conversation, remarked that his name was Robinson, and that this eighty belonged to him, and was his property, and told the witness he could use it as long as he took good care of it; that the next time Mr. Snow came around, he told Snow about this Mr. Robinson, and that Robinson said the property belonged to him, and Snow re-

marked that it did, and that there were, afterward, interviews between appellant and Snow, in which appellant's ownership of the property was admitted. This testimony is affected by that of another witness, who testified to a conversation had with Lyon, in which Lyon told him that appellant had promised him (Lyon) eight or ten acres of the land, providing he won the suit; and Lyon admits that he once applied to Kerfoot for a lease, and was refused.

This is a claim of adverse possession, set up to bar a title to land of great value, which rests essentially, for proof of its existence, upon the mere unsupported assertion of the party in interest. The alleged adverse possession was of such a character that it was unknown to, and unsuspected by, the agent of the owner, who had it in charge to take care of and pay the taxes during a period of more than twenty years, and who often visited the land.

The testimony upon which it is based, considered in view of all else which appears by the record, is not sufficiently convincing in its force to be reposed on, and be acted upon as the truth. The claim, in our judgment, fails of having been made out.

The statute under which the proceeding was instituted, authorizes a decree in favor of the better title.

We are satisfied with the correctness of the decree of the court below, and it is affirmed.

Decree affirmed.

ALFRED COVINGTON
v.
THE CITY OF EAST ST. LOUIS.

1. CONSTITUTIONAL LAW—*special legislation.* The clause of section 22, article 3, of the constitution, which prohibits the General Assembly from passing local or special laws incorporating cities, towns or villages, or changing or amending the charter of any city, town or village, is appli-

Syllabus.

cable to and restrictive of the General Assembly, in the enactment of charters or amendments to charters for cities and villages. It has no reference to past legislation, but simply prescribes the limit of future legislation in this respect.

2. SAME—*city ordinances.* The General Assembly has the power to delegate legislative authority incident to municipal governments to cities, but this can only be done by general law, under the constitution of 1870. When, however, it is done by such law, the constitutional mandate is fully complied with, and the ordinances to be adopted by different municipalities, under the power so conferred, may be as variant in their terms as the varying municipal necessities or sense of public policy, in those who exercise the legislative authority, may require.

3. All ordinances are necessarily local in their application, that is, they apply only to the municipality by which they are made, and can have no effect beyond it; and to hold that they are void because they are not of general and uniform operation throughout the State, would be to hold that it is impossible to invest municipal corporations with authority to make ordinances.

4. The charter of a city existing at the time of the adoption of the present constitution, provided that any tract of land adjoining such city, laid off into city or town lots, a plat of which being duly recorded, etc., should be and form a part of said city, provided the city council should so declare. In 1875, the city council declared a tract of land, which came within the requirements of the charter, a part of said city: *Held*, that the action of the city council was lawful, and that such territory thereby became a part of the city.

5. STATUTES—*a general statute, not inconsistent with a former one, does not repeal the former.* A general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent.

6. SAME—*special not repealed by general.* A general law does not operate as a repeal of a special law on the same subject, although passed at the same session.

APPEAL from the City Court of East St. Louis; the Hon. DANIEL MCGOWAN, Judge, presiding.

Mr. LUKE H. HITE, for the appellant.

Messrs. BOWMAN & HALBERT, for the appellee.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

By the 3d section of article 1 of the "act to reduce the charter of East St. Louis, and the several acts in force amendatory thereof, into one act, and to revise the same," approved March 26, 1869, (Private Laws of 1869, Vol. 1, p. 886.) it is enacted that, "any tract of land adjoining the city of East St. Louis, laid off into city or town lots, a plat of which being duly recorded in the recorder's office of St. Clair county, shall be and form a part of the city of East St. Louis: *Provided*, the city council shall, by ordinance, so declare." The tract of land on which is "Illinois City," adjoining the city of East St. Louis, was laid off into town or city lots as early as 1825, and a plat thereof was duly recorded in the office of the recorder of St. Clair county. The city council of the city of East St. Louis, on the 5th day of May, 1875, by ordinance, declared this tract of land should be and form a part of the city of East St. Louis.

Appellant, a resident of, and doing business within, the territory thus declared to be annexed, seeks to enjoin appellee, its officers, etc., from proceeding under this ordinance, and the only question presented for our determination is, does "Illinois City" now form a part of the city of East St. Louis?

Two objections are made, either one of which, it is argued, is conclusive against the authority of the city council to thus extend the city limits: 1st. Section 3 of article 1 of the city charter was abrogated by the adoption of the constitution of 1870. 2d. That section is repugnant to, and therefore repealed by, "An act to provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," in force July 1, 1872. (R. L. 1874, p. 244.)

We are of opinion that neither of these objections is tenable.

To hold that the constitution of 1870, by the mere fact of

its adoption, operated as a repeal of all special charters of cities, towns and villages, would be to declare that all municipalities thus incorporated have, from that time, been without the protection of any local law. This would most disastrously affect a very large portion of the public. Such a decision could only be warranted by the clearest evidence that this was the design, and the necessary construction of the language of the constitution.

It is not pretended there is any provision in the constitution which expressly repeals the special charters of cities, towns and villages, but it is insisted that such is the general policy manifested by that instrument.

We have held, in the cases referred to by the counsel for appellant, that certain provisions of the constitution became operative, without the aid of subsequent legislation, but these provisions have not the slightest reference to the question presented here. They stand by themselves, are construed independently of other provisions in that instrument on different subjects, and, although some of them affect municipal corporations, they do not do so in respect to their boundaries or their police regulations.

The clause of section 22, article 3, referred to, which prohibits the General Assembly from passing local or special laws incorporating cities, towns or villages, or changing or amending the charter of any city, town or village, is purely applicable to and restrictive of the General Assembly in the enactment of charters or amendments to charters for cities, towns and villages. It has no reference to past legislation, but simply prescribes the limits of future legislation in those respects.

But, it is argued, the prohibition of this clause of the constitution extends to legislative acts by the common council, or other legislative authority of cities, towns and villages, as well as to those of the General Assembly—that a legislative act can not be valid if adopted by such authority, which would be void if it were the act of the General Assembly. This is

more plausible than sound. The General Assembly, since the organization of our State government, has possessed power to delegate legislative authority incident to municipal government, to cities, towns and villages; but, since the adoption of the present constitution, this can only be done by general law, uniform in its operation. When, however, it is done by such law, the constitutional mandate is fully complied with, and the ordinances to be adopted by different municipalities, under the power so conferred, may be as variant in their terms as the varying municipal necessities or sense of public policy, in those who exercise legislative authority, may require.

All ordinances are necessarily local in their application—that is, they apply only to the municipality by which they are made, and can have no effect beyond it; so, the construction contended for, if true, would lead to the absurdity that it is impossible, under the present constitution, to invest municipal corporations with authority to make ordinances, because they can not be made of general and uniform operation throughout the State.

The power to make this ordinance was a part of the legislative authority with which the common council of the city of East St. Louis was invested when the present constitution was adopted, and its exercise is no more objectionable now than would be the exercise of any other municipal legislative power by the common council, conferred by that charter. See *Chicago City Railway Co.* v. *The People*, Sept. T. 1874.

The act in force July 1st, 1872, to "provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," does not profess to repeal any part of the special charters of cities, towns and villages, or to be an amendment thereto; nor does it contain negative words prohibiting its objects to be accomplished in any other mode, but it is a general law, authorizing such as choose to avail of its provisions, to do so. The rule is, that a general statute, without negative words, will not repeal the particular

provisions of a former one, unless the two acts are irreconcilably inconsistent. Sedgwick on the Construction of Statutory and Const. Law, 2d Ed. 97–8. And a general law does not operate as a repeal of a special law on the same subject, although passed at the same session. *Town of Ottawa* v. *County of LaSalle*, 12 Ill. 340, and authorities there cited.

There is no necessary repugnancy, that we can discover, between this statute and the charter of East St. Louis.

We held, in *The City of Galesburg* v. *Hawkinson*, 75 Ill. 152, sections 3 to 8 of that statute, inclusive, were in contravention of the constitution, and void, in that they assumed to invest the judiciary with powers purely legislative in their character; and whether the other sections may be regarded as affording an additional or cumulative remedy whereby to accomplish the purposes to which they relate, to that provided by special municipal charters, or whether they are also obnoxious to constitutional objection, upon other grounds, it is unnecessary to now decide.

Decree affirmed.

WILLIAM S. PROUDFOOT

v.

JOHN WIGHTMAN.

1. AGENCY—*proof of parol authority to sell land.* While it may be true, that parol authority may be sufficient to constitute an agency for the sale of real estate, yet if a purchaser relies upon such authority, and seeks to enforce the contract, the proof to establish the power of the agent must be clear, certain and specific. A bare preponderance of the evidence will not be sufficient.

2. DEGREE OF PROOF. In an ordinary chancery case, the complainant must establish the material allegations of his bill by a preponderance of the evidence; but on bill for the specific performance of a contract for the sale of land made by an agent under a parol authority, the burden of proof is thrown upon the complainant to establish the power by something more than a bare preponderance of evidence.

3. SPECIFIC PERFORMANCE—*refused for unfairness.* Where an application is made to a court of equity to decree the specific performance of a contract, if it appears the contract is unfair, unjust, or dishonest, the court will not lend its aid to compel its performance.

4. SAME—*fraudulent conduct of agent.* If an agent authorized to sell land at a given price, three years after, when the value has greatly advanced and is rapidly rising, sells the same at the price named, and at a great sacrifice, without informing his principal of the rise in value, this will be such a fraud upon the principal, as that a court of equity may refuse to enforce a conveyance to the purchaser.

APPEAL from the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

Mr. J. W. WAUGHOP, for the appellant.

Messrs. PERKINS & TRUMAN, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by William Proudfoot, in the Superior Court of Cook county, against John Wightman, to enforce the specific performance of an alleged contract for the sale of two five acre lots, in the county of Cook. Upon the hearing, the court entered a decree dismissing the bill for want of equity, to reverse which the complainant in the bill has prosecuted this appeal.

The contract upon which appellant relies, was executed on the 13th day of February, 1868, and was in the following language:

"Received of William S. Proudfoot $10, part pay on purchase of ten acres of land, to-wit: Lots 7 and 8, in F. Harding's subdiv. of W. ½ of N. W. ¼ of section 11, town. 39, range 13 E., 3d P. M., this day sold the said Proudfoot, for the sum of $150 per acre, to be paid in cash by said Proudfoot, upon the delivery to him or his legal assigns of a warranty deed to the said property, after title to same has been shown good of abstract.

"Dated, Chicago, this 13th day of February, 1868.

"JOHN WIGHTMAN,
"*Per* D. H. Horne."

As appears upon the face of the contract, it was not executed by appellee in person, but was executed by Horne, a real estate dealer in Chicago, who claimed to act as appellee's agent.

The defense interposed to the bill was, that Horne was not the agent of appellee, and had no authority to sell the land.

It is not claimed that Horne had any written authority from appellee to sell the property; and while it may be true, as was held in *Taylor* v. *Merrill*, 55 Ill. 52, that parol authority may be sufficient, yet when a purchaser relies upon parol authority of an agent to sell real estate, the proof to establish the power of the agent should be clear, certain and specific.

The important inquiry then is, was Horne empowered by appellee to sell the premises involved in this litigation?

The proof bearing upon this controverted question of fact is narrowed down to the testimony of Horne and appellee.

It appears, from the evidence, that appellee resided in Pekin, Tazewell county; that he purchased the property in 1853, and that in 1856 he sold one of the lots to his brother, who resided in St. Louis.

It is not pretended that appellee ever had but one interview with Horne previous to the alleged sale, and that occurred at Horne's office, in Chicago, about the 7th day of June, 1865.

Horne's version of that interview was, that appellee came into his office, and said he had some land for sale, and gave him the description of it, and his price, which he noted down in a book at the time; that he then asked appellee if he wanted him to sell the property, to which appellee replied, "yes, whenever you can get $150 per acre sell the lots, and write me, and it will be all right."

On the other hand, appellee testified that, while in Chicago, on June 7th, 1865, he was passing an office on Washington street, and noticed some Chicago maps hanging in the office, and called in to inquire the value of his land, and was informed that land in that neighborhood would probably sell

from $200 to $300 per acre, but was not much in demand. He then inquired if it could be leased for enough to pay the taxes, and started to leave, when he was requested to leave a description of the land, which the person in charge of the office copied from his memorandum book. Appellee further testified: "I told him that if any trade offered, he could write either to myself, at Pekin, or my brother, at St. Louis, and I left the office."

It also appears, from appellee's evidence, that this was the only time he spoke to any person in relation to the land during his visit in Chicago.

It does not appear that appellee ever had but the one interview with Horne, nor does it appear that Horne ever paid any taxes upon the land, or assumed any control over it whatever, nor was there any correspondence between appellee and Horne from the time of the interview, in June, 1865, until after the alleged sale, in February, 1868.

The burden of proof to establish every material allegation of the bill, of which the authority of Horne to make the sale was the more important, the law cast upon appellant.

In an ordinary chancery case, a complainant is required to establish the allegations of the bill by a preponderance of the evidence; but in a case of this character, where the title to real estate is attempted to be taken from one and vested in another by a decree in a court of equity, and that, too, by establishing the authority of an agent to make sale by parol, something more than a bare preponderance of evidence should be required. As was said in *Taylor* v. *Merrill*, *supra*, the proof should be clear and explicit, and not clouded with any uncertainty.

In the record before us, the appellant failed even to establish Horne's authority to sell the premises by a bare preponderance of evidence.

Horne testifies that he had authority; appellee denies it. Horne is interested in sustaining his own act, and getting a

commission; appellee is interested in defeating the sale. The two are so far upon an equality.

Conceding that the two are equally credible, then there is no preponderance in favor of appellant. But the facts and circumstances connected with the transaction, all tend to corroborate appellee.

It is not reasonable to believe appellee would have empowered a person, to him an entire stranger, to sell his lands. In addition to this, the acts of Horne tend to show he was not empowered to sell the land. A period of three years and eight months intervene from the date of Horne's alleged authority and the time he sold, and yet no letter or communication of any kind passed between the principal and agent. It is possible Horne may have had authority and this occurred, but it is so inconsistent with the usual manner in which business men transact business, that it looks incredible.

There is another feature in regard to this transaction, which does not commend it to the favorable consideration of a court of equity.

One witness, who was familiar with the value of real estate in the neighborhood where these premises were situated, testifies that, in the spring of 1868, the property was worth $300 per acre, and in the fall $600; while another witness, who was dealing in real estate, and knew the value, says, as early as February, 1868, the property was worth $500 per acre.

It is apparent, from the evidence, at the time of this pretended sale the land was worth much more than the price for which Horne pretended to sell it, and, in addition to this, it was rapidly rising in the market.

While it is true this fact, of itself, might not defeat the sale, if Horne had been empowered to sell, yet it is a fact calculated to cast suspicion upon the transaction, and proper to be considered as bearing upon the good faith of the acts of Horne.

When an application is made to a court of equity to decree the specific performance of a contract, if it appears the con-

tract is unfair, unjust or dishonest, the court will not lend its aid to compel its performance.

Now, even if Horne had been authorized in 1865 to sell the premises at $150 per acre, and in 1868 the land had increased in value to $500 per acre, it was the plain duty of Horne to notify appellee of the increase before attempting to sell, and if this duty was disregarded, and an attempt made to sacrifice the property, this would be a fraud upon the rights of appellee, which a court of equity could not tolerate.

After a careful examination of the record, we are satisfied the decree of the Superior Court was correct, and it will be affirmed.

Decree affirmed.

JOSEPH EVANS

v.

MILTON ANDERSON.

1. LEX LOCI. The law of the place where a contract is made must govern the contract. The existing laws of the State at the time of making a note therein, form a portion of the contract, and the liability of the maker must be determined under them.

2. If a promissory note is executed in the State of Indiana, though it does not so appear upon its face, the laws of that State will govern as to the defenses which may be set up against a recovery thereon.

3. It is a principle adopted everywhere, that the nature, validity and interpretation of contracts must be governed by the laws of the country where they are made, or are to be performed.

WRIT OF ERROR to the Circuit Court of Iroquois county; the Hon. N. J. PILLSBURY, Judge, presiding.

This was an action of assumpsit, by Joseph Evans, against Milton Anderson, upon a promissory note given by the defendant to John W. Jones, and assigned to the plaintiff.

The defendant pleaded a failure of consideration, that the note was made in the State of Indiana, and, that by the laws of that State in force at the time the note was given, the maker of a note was entitled to all defenses against it in the hands of an assignee, which he could make against the same in the hands of the payee, except when made payable in some bank, etc.

The plaintiff, among other things, replied that the note was assigned to him in the State of Illinois for a valuable consideration, before maturity, and also, that, at the time of the assignment, the defendant was a resident of this State.

The defendant demurred to the replications, the court sustained the demurrer, and rendered judgment for the defendant in bar of the action.

Messrs. BLADES, KAY & EVANS, for the plaintiff in error.

Messrs. DOYLE & KING, for the defendant in error.

Mr. JUSTICE BREESE delivered the opinion of the Court:

It would be an useless waste of time to discuss the principle which lies at the bottom of this case, as it has received the assent of all the common law tribunals of the United States, this State included.

The principle is, that the law of the place where a contract is made must govern the contract.

The note in question was made in the State of Indiana, and the laws of that State must govern as to the defenses which might be set up against a recovery thereon. It was in that State the maker undertook to pay. It was a contract of the place where made and where to be performed.

It is true, the note does not, on its face, purport to have been made in the State of Indiana, yet, it so appears by the plea, and the fact is not denied. The existing laws of a State at the time of making a note, form a portion of the contract, and the liability of the maker must be determined under

them. *Stacy, Admr.* v. *Baker,* 1 Scam. 417; *Holbrook et al.* v. *Vibbard et al.* 2 ib. 465; *Roundtree, Admr.* v. *Baker, Admr.* 52 Ill. 241; *Bradshaw* v. *Newman,* Breese (2d Ed.), 133; *Humphreys* v. *Collier et al.* ib. 297.

It is a principle adopted everywhere, that the nature, validity and interpretation of contracts must be governed by the laws of the country where the contracts are made, or are to be performed.

There is no difference of opinion on this question.

The judgment is affirmed. The liability of the maker of this note must be determined by the laws of Indiana, the State in which it was made.

Judgment affirmed.

ELISHA BUCK
v.
THE PEOPLE *ex rel.* Charles P. Swigert.

1. TAXATION—*no defense that the taxes are high.* It is no defense to an application for judgment against delinquent lands, that the taxes are high, where there is no unfairness or injustice in the assessment, and there is no inequality in the taxes imposed.

2. SAME—*sufficiency of proof of notice of applying for judgment.* An affidavit of a printer of a newspaper of the publication of the delinquent list and notice of applying for judgment, properly sworn to, which states the day when the publication was made, and the paper in which the list and notice were inserted, will be sufficient proof of publication to confer jurisdiction on the court to render judgment.

3. SAME—*description of lands for taxation by abbreviations.* The statute expressly authorizes the use of abbreviations in assessing property for taxation, and any description of property for the purposes of taxation, by which a qualified surveyor can locate and find the land, will be sufficient.

4. SAME—*objections not affecting objector.* A misdescription or defective description of a tract of land by an assessor, will not affect the taxes imposed on other tracts, and the law will not allow a party resisting judgment against his property for taxes, to raise an objection which does not apply to his property, but does to that of others, who do not object.

Syllabus.

5. SAME—*objections to judgment must be signed.* Objections to the rendition of judgment against lands for taxes, being in the nature of a pleading, must be signed either by the party or by his attorney, or the court will be warranted in disregarding them.

6. SAME—*order for levy of county tax.* Where the finance committee of a board of supervisors reported that it would require a levy of three mills on the dollar for county purposes, and that it would require a levy of a like per cent to pay interest on railroad bonds, and the board ordered a sufficient sum to be levied to pay the interest on the bonds and the three mills on the dollar for county purposes: *Held*, that the order of the board, taken in connection with the report, meant a levy of three mills on the dollar to pay interest on the county railroad bonds.

7. SAME—*certificate of municipal taxes not filed in time, etc., does not invalidate.* Under section 191, R. S. 1874, title "Revenue," if the officers of municipal bodies do not return their certificate to the county clerk of the taxes to be levied, in the time prescribed, the defect will be cured.

8. So, if the persons making such certificate fail to describe themselves as officers, with precise accuracy, or do not use the full name of their corporate bodies, this statute will cure the defects. The case of *Mix* v. *The People*, June T. '74, was decided under a different statute.

9. SAME—*county equalization.* Where the board of supervisors, in equalizing the assessment of the township assessors, raised the aggregate valuation of all the towns a trifle over one-fourth of one per cent on the entire assessment: *Held*, that, as this might have been necessary and incidental to a proper equalization, it did not invalidate the taxes levied on such equalized valuation.

10. SAME—*presumption as to legality of assessment, etc.* It will be presumed that taxes are properly and legally assessed, and are legally and justly due, in the absence of proof to the contrary. The collector's list and report of delinquent lands in the manner prescribed by statute, entitles him to judgment, unless the tax-payer satisfactorily shows that the taxes have been paid, or some other legal defense going to the merits.

APPEAL from the County Court of Kankakee county; the Hon. C. R. STARR, Judge, presiding.

Mr. STEPHEN R. MOORE, for the appellants.

Mr. H. L. RICHARDSON, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was a proceeding by the treasurer, in the county court of Kankakee county, to obtain judgment against delinquent lands and town lots, and for their sale for the taxes for the year of 1874, and the back taxes for the year 1873. On the hearing of the objections filed, the court below overruled them, and rendered judgment. Thereupon the objector prosecutes this appeal, and urges various objections to the validity of the order of sale.

The objections relied upon are, first, that the notice and application, as published, failed to confer jurisdiction, either of the subject matter or of the persons against whose lands the taxes were assessed; that the various local taxes were not legally assessed; that the lands are not described with sufficient certainty; that the equalization by the board of supervisors raised the aggregate valuation of the property of the county; and that the county taxes were in excess of the per cent allowed by law, and the local taxes were not levied within the time prescribed by the statute.

The objector does not insist that he is required to pay more than his just proportion of the tax, or that property or funds not liable to be taxed, has been assessed; nor that he has paid his tax, or that there is any injustice in its imposition, but simply that some officer intrusted with its levy or collection has failed to comply with some statutory requirement. But it is fortunate for the State, and our school system, our municipal governments and our benevolent institutions, that the great mass of our people have a higher sense of justice, and a clearer perception of duty, and hence fail to attempt an escape from so just a burthen, and waive all mere technical objections, and pay the sum they have been rated by the proper officers.

Nor is it any defense, to say that taxes are high. The construction of municipal improvements almost everywhere, on credit, and at high rates of interest, compels the imposition

of heavy burthens to meet the cost, with current expenses. Such improvements are made with a lavishness almost amounting to recklessness. And yet the officers of such bodies are generally elected for the purpose, and the entire community urge them on, or at least favor their construction. None can expect to have all of the benefits derived from such improvements, without being heavily burthened with taxes. To avoid them, economy should take the place of extravagance. The remedy is in the hands of the tax-payers. When they shall urge an economical administration of public affairs, and elect officers to carry out their views, then, and not till then, will the burthens of taxation be mitigated. The burthens are self-imposed, and fairness demands that the tax-payers should meet and discharge the taxes as they do other honest obligations incurred in business. All take a pride in the improvements made by their municipalities, and enjoy their benefits, and they should not be heard to say that they are warranted in evading paying for the same, or in imposing their portion of the burthens on others, in whole or in part. Stern justice demands that the creditors of the State, and of municipalities, teachers of schools, workmen in erecting school houses, contractors who improve the streets and beautify and adorn our cities, villages and towns, should be paid for the money loaned and labor expended for these purposes.

All of the objections in this case are merely technical, and devoid of merit. There is no pretense that the property of objectors is not liable to be rated, nor that they are unfairly or unjustly assessed; nor do they claim that a greater rate is imposed upon them than on other citizens of the district; nor that the amount levied is not indispensable to the county and township governments, the keeping of roads and bridges in repair, and for the maintenance of schools, and the preservation of order in the villages of the county. These are all not only legal, but indispensable purposes, and no just reason is seen why the objectors should not pay their fair and just proportion of these burthens, so far as they are imposed upon the

property in the municipality in which they reside. It would not be altogether fair, to suppose they desired to escape these burthens, when they enjoy all the benefits derived from their expenditures, and to unjustly impose them on others who enjoy no more, if so much, of the benefits flowing from the maintenance of these institutions. But, without regard to the motive which actuates them, they have an undoubted legal right to have the law as fairly and strictly applied to the questions they present, as in any other case.

Were, then, the notice and list, as published, sufficient to give jurisdiction to the court to hear and determine whether the order of sale should be granted? The publication of the delinquent list and notice appears to have been made on the 22d day of April, 1875. This is shown by the affidavit of the printer, sworn to before the county clerk on the 11th day of May, 1875. The affidavit has in the caption a proper venue, is signed by the publisher, and the clerk certifies that it was subscribed and sworn to before him on the day he names, and it was filed on the same day. If this affidavit is not sufficient in form, we apprehend that few would be found to stand the test. It states the day when the publication was made, the paper in which the list and notice were inserted, and, so far as we can see, fully complies with the requirements of the law, and must be held sufficient.

It is next insisted that the description of some of the lands is indefinite and uncertain, and therefore insufficient. We fail to perceive the force of the objection. The 184th section of R. S. 1874, p. 888, allows the use of abbreviations in assessing lands for taxes, and in advertising them when delinquent, and for an order of sale. We are unable to say that we can not comprehend the meaning of the contractions used, nor that any intelligent person, to say nothing of a qualified surveyor, could not as readily locate these tracts as he could lands by the usual descriptions employed in deeds of conveyance. We are wholly unable to appreciate the objection. But if it could be admitted to have any force under any circum-

stances, the objection does not apply, nor is it pretended that it applies to appellant's lands, and we can scarcely suppose that it will be seriously contended that, because the assessor were to misdescribe, or defectively describe, one tract of land, it would vitiate the entire tax levied in the county and State, and such would be the inevitable result of the doctrine contended for, if it were allowed. As well repeal the revenue law, as to give force to such objections. It would be more just to do so, than leave the burthen on those not able to litigate the payment of their taxes, and afford immunity to those that are.

Again, this objection does not apply to appellant's lands, and why should he intermeddle for the purpose of preventing the collection of the public revenue? His neighbors, so far as we can see, have not empowered him to interfere. If they choose to pay their taxes, how can it concern him or his interest? He only has a legal right to resist the payment of taxes imposed on his own property, leaving others to pay or resist, as their sense of duty and right may dictate.

The next objection is, that there were three mills levied for county purposes, and that it was intended to exclude all other levies, and that the three mills levied to pay interest on county bonds for railroad purposes, is unauthorized and void, as it was never levied.

As to all of these objections, it would be sufficient to say that, as given in the transcript, the long list of objections filed do not purport to be signed by the tax-payers, their attorneys, or, in fact, by any other person. All know that all pleadings or matters in the nature of pleadings, should be signed, either by the party or his attorney. And when such technical objections are being urged, we would expect that the uniform rules of practice, which have always obtained, would be observed. The court below was therefore fully warranted in overruling these objections on this ground, and in rendering judgment for the sale of the lands, as asked by the treasurer.

But if it could be conceded that the objections might be considered, we fail to see that they have any force. The finance committee reported that it would require a levy of three mills on the dollar for county purposes, and that was specifically levied. They also reported that it would require a levy of three mills on the dollar to pay the interest on the railroad bonds, and the board, by resolution, ordered a sufficient sum to be levied, to pay the interest on the bonds. Can any one doubt that the board, in view of this report, intended to and did levy the three mills necessary, as reported, for the payment of that interest. That such was their manifest intention, we presume no one can doubt. It would be difficult to make it plainer, although the sum could have been stated in the resolution, and thus rendered a reference to the report unnecessary. But that is all that it would have accomplished.

It is also urged that the local taxes were not levied and returned to the clerk in time; and in support of the position, the case of *Mix* v. *The People*, June T. '74, is referred to, as controlling this. That tax was levied under the law of 1872, whilst this is under the statute of 1873, which amends the prior law. See section 191, p. 890, R. S. 1874. That section declares that "no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof." This provision most effectually disposes of this objection.

Suppose the officers of these municipal bodies did not return the certificate of the levy in the time prescribed, still this section cures the defect. Or suppose they did not describe themselves as officers, with precise accuracy, or they did not use the full name of their corporate bodies, such defects are cured.

It is not denied that the persons making the levy were the real persons holding the offices, or that they were not fully empowered to levy the tax. And if they had the power, if

the objections urged were true, still they do not go to the justice of the tax itself, but they simply raise the most technical objections, which are devoid of all merit, and such as courts of justice never allow, unless compelled by positive enactment.

As to the local tax exceeding the per cent allowed to be levied, we fail to see that such is true. We find no evidence of the fact in the record, nor have we been referred to any. Hence we dismiss that question without further discussion.

This, then, disposes of all questions but the one urged against the equalization of the town assessments by the county board. It is urged that the equalization raised the valuation on the property above the amount assessed by the town officers. The law governing such cases provides that, "Neither shall it increase the aggregate valuation of all the towns or districts, except in such an amount as may be actually necessary and incidental to a proper and just equalization." It is true that the aggregate of the assessment was raised, but only a trifle over one-fourth of one per cent on the entire assessment. This may have been altogether necessary and incidental to a proper and just equalization. We are not able to say it was not necessary. It may be that an expert arithmetician could have approximated nearer to the first assessment, had he taken time and the requisite amount of pains. But we fail to perceive any force in this objection.

The law having provided for the assessment by the township officer, having given an appeal to the board of review, and required the clerk to extend the tax on the collector's list, it presumes that the taxes are properly assessed, and are legally and justly due. And the return of the collector to the county treasurer, of delinquent lands, rebuts the presumption that they have been paid. His return may be likened to an execution returned "no property found," by a sheriff. And the same is true of the treasurer's return to the court. If the presumption exists that the taxes are due when the collector's books are completed, and they are handed to him, what sub-

sequently transpires to rebut the presumption? Not the returns of the officers charged with the collection of the taxes. Nor does anything else occur to us that can possibly have that effect. The treasurer has only to present his corrected list to the court, in the manner prescribed by the statute, to be entitled to judgment, unless the tax-payer can satisfactorily show that they have been paid, or some other legal defense.

That has not been done in this case, and the judgment of the court below must be affirmed.

Judgment affirmed.

JOHN M. ADAMS

v.

CHARLES GARDNER.

1. PLEADING—*when particular damage must be stated in declaration.* It is a rule of pleading that, whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage he has sustained, to enable him to give evidence of it.

2. In an action for damages for driving against a plaintiff's phaeton and breaking it, the declaration stated that the plaintiff was compelled to expend $500 for repairs, and that the phaeton became useless: *Held*, that this was broad enough to admit evidence of cost of repairs and of diminished value of the phaeton after it was repaired, but, that evidence in regard to the loss of the use of the phaeton, while being repaired, was inadmissible, no special damage on that account being alleged.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. BENNETT & SHERBURNE, for the appellant.

Messrs. MILLER & FROST, for the appellee.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action to recover damages for driving against and breaking the plaintiff's phaeton, wherein, on trial before the court below, without a jury, judgment was rendered for the plaintiff for $132.50, and the defendant appealed.

The plaintiff on the trial testified that the reach, one of the shafts and the dash board of his vehicle were broken, both the axles were sprung and the top was bent; that the cost of the repairs was $17.50, and he further testified, against objection, that the phaeton was worth, he considered, at least $100 less after it had been broken and repaired than before the injury; that a repaired buggy was never as good as it was before; that it took about ten days to have the repairs made; that the cost of the hire of a buggy at a livery stable would be about $1.50 or $2 per day.

It is objected, that testimony as to the last two items of damage—the diminished value of the phaeton after being repaired, and the loss of the use of it while being repaired—was not admissible under the declaration, because the only damage averred in the declaration is, the breaking of particular portions of the phaeton, in consequence of which plaintiff was compelled to spend $500 in repairs.

But the declaration alleges that by the breaking of it, the phaeton became useless. This allegation was broad enough to admit of evidence of how much the phaeton was lessened in value by the injury.

But the evidence upon the subject was quite unsatisfactory as showing that the phaeton, after being repaired, was worth $100 less than before broken, and the court must have allowed that full amount.

The carriage builder who repaired it, testified that it was worth $250 or $275 before it was broken; that he did not know how much less it was worth after it was repaired than before the injury; that the work he put on it was good; he

put new wood in place of the old wherever the old was broken, and made a workmanlike job of it.

The evidence in regard to the loss of the use of the buggy was clearly inadmissible. No such claim of special damage was laid in the declaration. The only claim of damage made by the declaration, more than that the phaeton had become useless, was the expense of repairing. It is a rule of pleading that, wherever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, then, in order to prevent surprise on the defendant, the plaintiff must state the particular damage he has sustained, or he will not be permitted to give evidence of it. *Olmstead* v. *Burke*, 25 Ill. 88; 1 Chitty's Pl. 441.

This rule would exclude evidence of the loss of the use of the phaeton under this declaration.

It was in evidence that, after the repairs had been made, plaintiff presented to defendant what he said was a bill of the damage done, which was $17.50, and made no claim for loss of use of his phaeton, nor of damage because of its being then a repaired phaeton.

We are of opinion the court below manifestly erred in its finding and judgment, and the judgment is reversed, and the cause remanded.

Judgment reversed.

CHARLES CHINIQUY

v.

THE PEOPLE *ex rel.* Charles P. Swigert.

1. TAXATION—*collector's notice of application for judgment as to back taxes.* If the collector's notice of application for judgment for taxes contains a note at the head of the published list, that the prefix of the letter "*a*" indicates a back tax for the preceding year, and the letter "*b*" for the two preceding years, and these letters are so used when there are back taxes, this will be a sufficient compliance with the statute.

Syllabus.

2. SAME—*party objecting to judgment can not complain of irregularities as to others.* A party objecting to judgment against his lands will not be allowed to urge objections as to other tax-payers not complaining, but will be confined to such as apply to his own property.

3. SAME—*time of making affidavit by collector, etc.* The failure or neglect of the collector and county clerk to compare and correct the list of delinquent taxes, and of the collector to file an affidavit that the list is correct, on the first day of the term at which application for judgment is made, not affecting the substantial justice of the tax, furnishes no ground for withholding judgment. The omission is supplied if the affidavit is filed after the first day of the term.

4. SAME—*collector's return is prima facie evidence of the facts necessary to render judgment.* The collector's return of delinquent lands to the county court is sufficient evidence of the assessment, the levy of the tax, and that it is unpaid, to authorize judgment, unless the tax-payer shall show that it is substantially unjust to render the same.

5. SAME—*no order of county board necessary for extending State taxes.* No order or resolution of the county board is necessary to authorize the county clerk in levying and extending State taxes. It is his duty to do so under the statute.

6. SAME—*description of property.* The description of property for taxation, as lot 4, and blocks 86, 87, etc., in a party's addition to a city, is sufficient. So a description, as the east end of blocks 99 and 100, will be good, and understood as the east half thereof.

7. SAME—*variance as to description in list and judgment.* If the collector's return of delinquent lands describes a person's property as the east end of lots 99 and 100, and the judgment is against the undivided third of the east end of those lots, there will be no variance, as it will be presumed the taxes were shown to have been paid before judgment on the other undivided two-thirds.

8. SAME—*certificate of municipal taxes not filed in time required.* If the certificate of the amount of municipal taxes is not filed with the county clerk within the time required by statute, this will not invalidate the levy, as the irregularity or defect is cured by sec. 191 of the Revenue law of 1874.

9. SAME—*use of initials or abbreviations.* There is no objection to the use of initials or abbreviations in the collector's report, to indicate the kind of tax, at the head of each column.

10. SAME—*legality of tax, how questioned.* If a party intends to urge in this court that a portion of the State and school taxes levied are unconstitutional and void, he must make the specific objection in the court below, and preserve the evidence of the facts in the record.

11. SAME—*former decisions modified by statute.* Under section 191 of the Revenue law of 1874, unless there are shown in defense matters which affect the "substantial justice of the tax itself," its collection will be enforced. That section has overruled or modified most, if not all, the prior decisions of this court in regard to proceedings for the collection of the revenue.

12. TERM OF COURT—*regarded as one day.* It is a familiar rule of law that a term of court, for most purposes, is considered as but one day.

13. COLLECTOR'S WARRANT—*protection to officer levying.* If a collector should be sued in trespass for levying upon property for taxes, the warrant, without any other evidence, will show a complete justification, and it will be evidence that all of the legal steps have been taken to assess, levy and extend the taxes, and this though he has been compelled to return his warrant unsatisfied.

14. CONSTITUTIONAL LAW—*as to rate of county tax that may be levied.* Sec. 8, of art. 9, of the new constitution, which prohibits any county from levying a tax exceeding seventy-five cents on the one hundred dollars' valuation, etc., does not apply to a tax levied to pay interest on bonds given in aid of a railway, voted before the adoption of that instrument, although the subscription and the issue of the bonds occurred after its adoption.

15. MUNICIPAL SUBSCRIPTION AND BONDS—*waiver of condition.* If county authorities issue and deliver the bonds of the county to a railway company before performance of the conditions upon which they were to be issued and delivered, this will be a waiver of the condition by the county.

APPEAL from the Circuit Court of Kankakee county; the Hon. NATHANIEL J. PILLSBURY, Judge, presiding.

This was an application, by Charles P. Swigert, county collector, to the county court, for judgment against delinquent lands and lots for the year 1873, and back taxes, special assessments, interest, etc. Objections to the rendition of judgment were filed by Charles Chiniquy and others, as to this real estate, most of which are noticed and answered in the opinion of the court. The county court overruled the objections, and rendered judgment, and an appeal was taken to the circuit court, where a similar judgment was rendered.

Mr. S. R. MOORE, for the appellant.

Mr. H. L. RICHARDSON, for the appellees.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This record presents several questions which were not discussed in the case of *Buck* v. *The People, ante,* p. 560, which we now propose to consider.

It is urged, that the collector's report, as published, fails to state the several years for which the taxes are due and delinquent. An examination of this record, so far as we can see, does give the years for which the several taxes are due. The notice states, in a note at the head of the published list: "The prefix of the letter '*a*' italic, indicates a back tax for the year 1872, and '*b*' for the years 1871 and 1872." And on turning to the list, it will be found that the letter "*a*" is prefixed to some of the taxes assessed to appellant, but we do not find the letter "*b*" prefixed to any of his lands. This fully apprised him of the years for which his lands stood charged, with the several taxes and their amounts. This was all he had a right to know, from the advertised list, on that subject. It was as full a notice to him, as if the year had been written in full, opposite to the tax. If it could be said that there is some ambiguity where the letter "*b*" is used, he has no right to complain, as he is not, nor can he be, here to complain for others, or to protect their interests. It is no concern of his if his neighbors see proper to pay just and fair taxes, levied for lawful purposes. We think this is a full and fair compliance with this requirement of the statute.

It is likewise objected, that the collector and county clerk did not compare and correct the list, and that the collector failed to file the affidavit that the list was correct, on the first day of the term, as required by the 190th section of the Revenue law.

It is a familiar rule of law, that the term of court, for most purposes, is considered as but one day, and no reason is perceived why the same rule should not apply to a tax case as well as to others. But if the rule did not apply, shall the State and municipal governments be deprived of their revenue,

and shall they come to an end, simply because the officer, from sickness, inevitable accident, or even obstinate willfulness, or sheer negligence, fails or is unable to make the affidavit? The legislature could have intended no such rigid construction. But the latter clause of section 191 (R. S. 1874), removes all objection to this affidavit. It provides, that no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax, or the assessment thereof. Now, the collector was an officer connected with the collection of the tax, and this non-compliance with the letter of the statute did not affect the substantial justice of the tax, and, under the remaining clause of that section, there can not be the shadow of a doubt that the court was fully empowered to permit the collector to supply the omission, after the first day and during the term.

It is objected, that there is no evidence that the land was assessed. In this, counsel mistake the force and effect of the collector's return. That, of itself, is evidence, and ample evidence, of the assessment, the levy of the tax, and that it is due and unpaid, upon which the statute requires the court to render judgment, unless the objecting tax-payer shall show that it is substantially unjust to render the judgment against the land. It devolves upon him to show the injustice of the claim for the judgment. Appellant's counsel would not claim that, whilst the collector had the warrant for the collection of these taxes, if he had seized personal property for their payment, and he had been sued for a trespass, he would have been required, in justifying the act, to go back and prove that the land was regularly assessed. All know that he would only be required to produce his warrant as a complete justification of his authority to levy. The warrant is evidence that all of the legal steps have been taken to assess, levy and extend the tax. Nor does the fact that the collector has been

compelled to return his warrant unsatisfied, in anywise change or affect the presumption.

Nor was it necessary for the people to produce the proceedings of the county board, showing the levy of the taxes. If they were not levied, or were irregular or unwarranted, it was for the defense to show it. Nor was the resolution of the county board, levying, or requiring the county clerk to extend the State tax, at all necessary. It is the duty of the clerk to extend such taxes, under the requirement of the statute. Sections 119 and 120 regulate this duty of the clerk. The 122d section provides for the levy of taxes for municipal bodies, and the manner in which they shall certify the same to the county clerk; and the 127th section provides for the manner in which he shall estimate the per cent and extend the same, and it also provides for the extension of taxes levied by the county board for county purposes.

The descriptions, so far as we can see, are all the law requires as to Chiniquy's lot 4. So is the description of blocks 86, 87, etc. We are at a loss to see how any person could imagine that there can exist the least ambiguity in this description; nor do we see any force in the objection that there is a variance between the collector's list and the judgment, as to blocks 99 and 100. They are described in the collector's list, each, as the east end of the block, and the judgment is against an undivided third of the east end of each block. The east end, all would understand to be the east half, and if it appeared on the trial, as we suppose it did, that all of the taxes had been paid on these blocks, but that upon an undivided one-third of the east end, we can see no possible reason why the court should not so render the judgment.

It is again urged, that the certificates of the levy of the local municipal taxes were not filed in the time required by the statute. The answer to this is, as was said in *Buck* v. *The People, supra*, that it is cured by the 191st section of the Revenue law. This cures all defects growing out of the failure to file the certificate on or before the day named in the

122nd section. It renders certificates made after that time valid and binding. Nor do we see any objection to using initials or abbreviations in the collector's report, to indicate the kind of tax, at the head of each column.

It is urged, that there was levied a tax to pay the interest on $100,000 of county bonds, issued for railroad purposes, which increases the county levy to a larger per cent than is authorized by our constitution. The vote in favor of issuing the bonds was taken in 1869, and before the adoption of the constitution, and hence is not within its prohibitions. The 8th section of art. IX prohibits any county from levying a tax exceeding seventy-five cents on the $100 valuation, except for indebtedness existing at the adoption of the constitution, unless authorized by a vote of the people of the county. When this vote was had, so far as this record discloses, it became a debt of the county, and a *mandamus* would have compelled the county to issue bonds as evidence of that indebtedness. It was not necessary to issue the bonds to create an indebtedness. As well contend that, because the bonds are not due, there is no debt, when all know the debt exists, although it may not be due. So, in this case, there was a debt, although the bonds had not issued nor had the time arrived for its payment. It was, therefore, an indebtedness, existing, within the meaning of that clause of the fundamental law.

Even if there was a condition which was not performed by the railroad company, it is not shown in the record what it was. It not appearing, and the bonds having been issued by the county authorities, we must presume the condition was waived by that body. The bonds having issued, it must clearly appear that they were issued without authority, before the tax levied to pay interest could be defeated, even if that defense could be interposed as an objection, to prevent the recovery of a judgment ordering the sale of delinquent lands.

It is urged, that the certificates of levy of taxes by municipalities are irregular, not being signed or filed, etc. But

we fail to see that it was shown that these taxes were ever extended, or that they form any portion of the taxes for which this judgment was rendered. We would suppose that there is not a clerk in the State who would levy a tax on a mere unsigned blank, or even on a certificate properly signed, but not stating for what municipality the tax was intended to be levied. Such recklessness or ignorance could not be expected, hence we presume no taxes were extended on such papers. They do not appear by the heads of the several columns, and we are warranted in supposing, that, had they been extended, and formed a part of these taxes, proof of that fact would have been made by appellant.

It is also urged, that seven thirty-sixths of the State and school tax for the year 1873 is unconstitutional and void, as was held in *Ramsey* v. *Hoeger*, 76 Ill. 432. There is nothing, so far as we can see, in this record which shows that fact. If such is the case, the objection should have been made in the court below, and shown to exist. But it was not raised, so far as we can see, in the county or circuit court, and the objection comes too late, when raised for the first time in this court.

A careful examination of the record fails to show anything that affects the "substantial justice of the tax itself," and until that is shown, the court must enforce its collection. The amendment introduced into the 191st section of the present revenue law, has produced a radical change in proceedings to recover judgment for delinquent taxes, and has overruled or modified most, if not all, of our previous decisions on the questions thus arising.

In this and Buck's case, the abstracts are exceedingly meagre, and fail entirely to comply with the rules of court, and are inconvenient in their consideration. And the transcripts are clumsy and inconvenient to handle, examine, or to file; hence we have received less aid from the preparation of the cases than was required by the great number, and the intricacy of the questions presented.

The judgment of the court below must be affirmed.

 Judgment affirmed.

DENISON F. HOLMES

v.

NICHOLAS N. SHAVER.

1. JUDICIAL SALES—*caveat emptor applies.* In the absence of all fraud, a court of equity can not relieve a purchaser at a judicial sale on the ground that the title fails. The maxim *caveat emptor* applies the same in equity as at law, in respect to such sales.

2. SAME—*failure of consideration.* Where land is purchased on execution, and the same is redeemed by a judgment creditor, and the purchaser at the first sale again bids off the same, and, by an arrangement with the redeeming creditor, gives his notes for the amount of his bid, and receives a certificate of purchase, a court of equity will not enjoin the collection of the notes on the ground that a prior mortgagee has instituted proceedings to have both sales set aside. In such case, there is no failure of consideration.

3. JUDGMENT—*in another county—time of filing to hold real estate.* The question of diligence in giving notice by a judgment creditor of the recovery of a judgment in another county, upon which a redemption of land from a prior sale is made, does not arise, unless there are intervening creditors to be affected by it. The purchaser at the prior sale can not raise this question.

APPEAL from the Circuit Court of Carroll county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Messrs. ARMOUR & SHAW, for the appellant.

Mr. C. B. SMITH, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

This was a bill in chancery, in the Carroll circuit court, by Denison F. Holmes, complainant, against Nicholas N. Shaver, defendant, to restrain proceedings at law, instituted by defendant against complainant, for the recovery of the amount of two promissory notes executed by the latter to the former.

On demurrer to the bill, the injunction was dissolved and the bill dismissed. Complainant appeals.

It appears one Henry Smith, in 1850, executed to the trustees of schools of township 23 north, range 7 east, a mortgage on the north-east quarter of section seven (7), in that township and range, which was duly recorded, and, to foreclose the same, they sued out a *scire facias* on the 10th of September, 1859, and such proceedings were had thereon that a judgment was rendered in favor of the trustees, and a special execution ordered to sell the mortgaged premises. A sale was had, and appellant became the purchaser. Appellee, having obtained two separate judgments against Smith, the mortgage debtor, before the time of redemption expired, paid to the sheriff the amount of appellant's bid, with interest, and at the same time placed the executions on these two judgments in the hands of the sheriff, who levied them on this north-east seven, and, when offered for sale, appellant was the highest bidder, he bidding the amount of appellee's two judgments.

An agreement was then made by appellant and appellee that, in consideration the executions should be returned satisfied, appellant would execute his notes to appellee for the amount of the executions. The execution was returned satisfied, a certificate of purchase executed to appellant, and the notes in suit were executed by appellant to appellee. In lieu of paying the money on his bid for the lands, the execution creditor agreed to take these notes.

On this showing, no court could raise an equity on behalf of the maker of the notes, the appellant here.

But appellant says—and he makes the proceedings a part of his bill—that one Franklin Smith and Latham Conwell, claiming a lien on this land through a mortgage executed by Henry Smith to the Racine and Mississippi Railroad Company, on the 9th of April, 1856, have commenced a suit in equity to set aside these judgments, executions, and sales made by the trustees of schools and by appellee, and if they succeed, he will have received no consideration for his notes executed to appellee, and now in suit. On this additional

showing, it is impossible to perceive where the equity of appellant arises. Evidently, he received from appellee all he contracted for.

What does it matter, in a court of equity or in a court of law, if the title of a purchaser at a judicial sale, as this was, should fail? Can equity relieve, in the absence of all fraud, in such a case? The maxim there, as at law, is *caveat emptor*. The buyer must look out himself. The books are full of cases where this maxim has always been applied, and in this court especially. Among the latest are *Bassett* v. *Lockard*, 60 Ill. 164, and *Bishop* v. *O'Conner*, 69 ib. 431. The rule governing a purchase at a judicial sale, is, that there is no warranty, and the validity of the title must be at the purchaser's own risk.

The argument of appellant directed to a want of diligence by appellee to give notice of his judgment obtained in Ogle county, against Smith, by failing to file it in Carroll county, has no force here, as there are no intervening creditors to be affected thereby.

We see nothing in this record of an equitable nature of which appellant can claim a benefit. There is no equity in his case, and the bill was properly dismissed, and the decree dismissing it is affirmed.

Decree affirmed.

JUNIUS MULVEY

v.

DANIEL H. CARPENTER *et al.*

1. REDEMPTION—*title acquired by judgment creditor depends on validity of previous sale.* If a sale of land under execution is void by reason of the judgment or decree on which the execution issues being void, a redemption and sale by a judgment creditor will also be void, and no title will pass.

Statement of the case.

2. JURISDICTION—*to award execution on decree at a subsequent term.* Where a decree of foreclosure against two defendants, one of whom was brought into court by publication, provided that the master appointed to sell should report any deficiency after the sale, and that an execution issue against the defendants personally liable to pay the debt for such deficiency, and, about three years and a half after such report, the court ascertained the deficiency, and awarded an execution against one of the defendants, without any new notice of the intended action, under which land was sold: *Held*, that the court had no jurisdiction to make the supplemental order awarding the execution, and that the sale was a nullity.

3. Where a final decree is made, in a suit in chancery, confirming the master's sale of property, and the cause goes off the docket, and it is, at a succeeding term, reinstated, without notice to any adverse party whose interests are to be affected, all subsequent orders will be without authority of law, and void.

4. DECREE—*uncertainty.* Where a decree of foreclosure against two defendants, one of whom held the legal title to the property in trust for the other, provided that, on the coming in of the master's report of sale, an execution should issue on the decree for any deficiency not realized by the sale against "the defendants who are personally liable:" *Held*, that the order was indefinite and uncertain as to which was personally liable, but being joint against the "defendants," no execution could issue against one only of them.

APPEAL from the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

This was a bill in chancery, filed by Daniel H. Carpenter and Amos F. Tompkins, against Junius Mulvey, to set aside a sale on execution of land, a redemption and re-sale on a second execution. The court below decreed the relief sought, but required of the complainants the amount paid by the defendant. The opinion of the court states the substance of the material facts.

Mr. JOHN BORDEN, for the appellant.

Messrs. BONNEY, FAY & GRIGGS, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

Whether titles, which, it is said, parties have acquired to the lands in controversy from Wiltberger, while the decree of foreclosure in the case of *Wiltberger* v. *Embree et al.* remained in force, and before it was reversed in this court, will prevail over titles previously acquired from Embree, the mortgagor, is a question that has no relation to the merits of the present controversy, and we shall not now discuss that branch of the case. So far as the mortgage claim was presented by the original bill, it was formally withdrawn on the hearing, it appearing that appellant's wife held that interest, whatever it was, and that he had no direct interest in it. That branch of the case having been dismissed, the remaining controversy is confined within narrow limits, and involves the consideration of but few questions, and the discussion of no principles of law, except such as are elementary.

The most important question, and indeed the only one which concerns, fundamentally, the validity of the title appellant claims to the lands, is, whether the execution issued on the judgment, or decree, in *Monroe* v. *Tompkins et al.* under which the property was originally sold at sheriff's sale, and from which it was redeemed by appellant, on an execution issued on a judgment in his favor, against Tompkins, was void, as having been issued under a judgment, or decree, rendered in a cause in which the court had no jurisdiction of the person of defendant Tompkins.

The judgment in favor of appellant, against Tompkins, was entirely regular, and the execution under which the redemption was effected was valid; but if it shall be determined the execution issued under the decree in *Monroe* v. *Tompkins et al.* was void for want of jurisdiction in the court to award it, the sale under it being void, it would follow the redemption based on it would also be void. The judgment creditor is bound to take notice whether the court

that pronounced the decree or judgment under which the sale was made, from which he is about to redeem, had jurisdiction in the cause. It is a familiar principle, if the court had no jurisdiction, all proceedings under the decree or judgment would be a nullity, and a party redeeming from a sale in such a case could acquire no title to the land. His redemption can give no validity to the previous sale, which was absolutely void for want of jurisdiction in the court. *Johnson* v. *Baker*, 38 Ill. 98.

Whether the sale from which the redemption was made was void, is purely a question of law, and is unaffected by the equities arising between the parties. What private contract Tompkins may have had with Monroe or Stewart, in regard to the mortgage indebtedness, whether he or Bell should be liable for the amount that should remain after the master's sale of the premises, is wholly immaterial in the decision of the case. It is not shown appellant had any knowledge of the contract, if any existed, and if he had, we are not aware it would affect his rights in the premises. It may be true, as charged, that the property was in fact sold to Bell, but, for his accommodation, the title was placed in Tompkins. He gave his promissory notes for the purchase money, and executed the mortgage that was subsequently foreclosed by Monroe, for the benefit of Stewart and his creditors. No matter what may have been the relations between Bell and Tompkins in regard to the property, the latter was legally bound for the purchase money, to the same extent he would have been had he made the purchase on his own account.

In the suit commenced by Monroe to foreclose the mortgage, Tompkins and Bell were both made defendants. The former was alone personally served with process, and the latter was brought into court by publication, under the statute. Bell was defaulted, but Tompkins filed an answer, prepared, perhaps, by Monroe, but in fact signed by other counsel, in which he substantially admitted all the allegations of the bill.

Accordingly, a decree was entered, finding the amount of the mortgage indebtedness, and directing a sale to be made of the mortgaged premises, if default should be made in payment of the amount found due, by a day fixed. It was recited in the decree that Tompkins was the agent of Bell in purchasing the property, and, by a private agreement made at the time between them, Tompkins was to hold the legal title to the property for the use and benefit of Bell. The decree provided that, if the moneys arising from the sale should be insufficient to pay the amount found to be due, with interest and costs, the master should specify the amount of such deficiency, in his report of the sale, and "on the coming in and confirmation of said report, the defendants who are personally liable for the payment of the debt secured by the said mortgage, pay to the complainant the amount of such deficiency, with interest thereon from the date of such last mentioned report, and that the complainant have execution therefor."

Having first given the requisite notice, the master, on the 27th day of May, 1865, sold the mortgaged premises, under the decree, as directed. On the 7th day of July, 1865, he filed his report of the sale, showing, after the appropriation of the proceeds of the sale according to the direction given in the decree, a deficiency of $1579.09.

On the 21st day of January, 1869, a further order was entered in the cause, reciting, among other things, the deficiency that remained after applying the proceeds of the sale of the mortgaged premises as reported by the master; that such deficiency then amounted to $1893, "and that complainant have execution against the said defendant Tompkins therefor." It was under the latter order the execution was issued on which the sale of Tompkins' property was made, from which appellant redeemed, and under which he acquired the title he now insists upon.

On the final hearing of this cause, the court decreed the sale and redemption were void, and set aside the sheriff's deed

to appellant for the premises, but imposed upon complainants, as conditions upon which the relief would be granted, that they should, within a time fixed, pay to appellant the balance due on the decree in *Monroe* v. *Tompkins and Bell*, with interest, and the amount of appellant's judgment at law against Tompkins. Appellees, although dissatisfied with the conditions imposed as to the relief granted, have assigned no cross-errors.

We now recur to the principal question first suggested, viz: whether the sale made under the execution issued on the decree in *Monroe* v. *Tompkins*, was without authority of law, and hence void.

It can not be maintained on the ground the original decree awarded execution against "the defendants who are personally liable for the payment of the debt secured by the mortgage," because the execution was not issued under that order, but under the order made January 21, 1869. The first order is indefinite and uncertain. Who was "personally liable for the payment of the debt secured by the mortgage," the court does not indicate by anything contained in the decree. Against whom, then, was the execution to issue? It was recited that Tompkins was the agent of Bell for the purchase of the property, and, by a private agreement made between them at the time, the title was merely placed in Tompkins for the use and benefit of Bell. What this may mean, is not very clear, but, if it means anything, it is certainly that the court intended to declare that Bell was the party who was personally liable for the payment of the debt. It is not an unreasonable inference, from this recital in the decree, that no execution was to be awarded against the property of Tompkins for any deficiency that might remain; but however this may be, that was a joint decree, and the execution was to issue for any deficiency against the "defendants." There were but two defendants. Bell had not been personally served with process, and no execution could rightfully be awarded against him. The decree made no provision for issuing any execu-

tion separately against the property of Tompkins for any deficiency that might remain unpaid after the sale of the mortgaged premises. It was this fact, no doubt, that gave rise to the making of the order of January 21, 1869, for a separate execution against the property of Tompkins.

By what authority did the court assume to make the supplemental order of January 21, 1869, awarding execution against Tompkins for the balance remaining due on the original decree? No notice was given to Tompkins that an application would be made to the court to award an execution against him. It may be he would have been able to show cause against it. It was essentially a new proceeding, and what was done was, in effect, a personal judgment against him, as at law, for a large amount of money, in a cause where he insists he was not liable personally for anything. Nor was it simply directing the issuing of an execution previously ordered "on the coming in and confirmation" of the master's report. The court found the deficiency to be $1893, and ordered that "complainant have execution therefor." Under the former decree, if any execution could issue at all against Tompkins, it could only be for $1579.09, with interest thereon from the date of the master's report.

It is indispensable to the validity of the last order, that the court, in some way, should have obtained jurisdiction of the person of defendant Tompkins. It did not have jurisdiction by any notice given to defendant, and hence there was a total want of jurisdiction, unless it can be maintained the cause had been continuously pending in court since the original decree in 1865, and that defendant was in court by virtue of the service of the original process, and his appearance in accordance therewith. This position can hardly be sustained. It will be borne in mind the original decree was rendered in 1865, the sale of the mortgaged premises took place in May thereafter, the master's report of the sale, showing a deficiency of $1579.09, was filed on the 7th of July, 1865, and on the 25th of September, 1868, the master's re-

port, by an order entered of record on that day, was by the court confirmed. This would seem to have been an end of the case, and, in the absence of anything appearing to the contrary, it will be presumed it passed from the docket. If so, the court manifestly lost all jurisdiction of the cause and the persons of the parties, and, unless it was placed back upon the docket, upon notice to the parties adversely interested, all further orders made in the cause would be without authority of law. There is no pretense Tompkins had any notice the cause was to be re-docketed, that execution might be awarded against him, or for any other purpose.

It is apparent that neither Monroe, nor Stewart, on whose behalf Monroe was foreclosing the mortgage, ever intended, when the original decree was rendered, to hold Tompkins liable for the payment of any deficiency after the sale of the mortgaged premises. Equitably, it was the debt of Bell, and all parties seem to have agreed he ought to be made pay it. The arrangement by which Tompkins permitted the title to the property to be vested in him, and assumed the legal liability to pay the purchase money, was entered into partly at the request of Stewart, and to oblige him as well as Bell. After the mortgage sale, neither Monroe nor Stewart gave the matter any further attention. The object was, to get the title to the property back into the hands of the original owner, and that was accomplished by the mortgage sale, and the deed made in pursuance thereof.

The matter rested until it was revived, in 1869, by appellant, who proposed, for a share, to collect the balance due on the decree, from Tompkins, or in some way make it out of his property. After some negotiations, his proposition was accepted by Monroe, and thereafter appellant assumed to manage the affair. Neither Monroe nor Stewart gave it any personal attention. It was found appellant could not obtain an execution, as at law, for the deficiency, without a further order of court. Accordingly, appellant had some papers prepared, which Monroe signed, which enabled him to procure

the making of the order of January 21, 1869, and, subsequently, appellant sued out an execution under it against Tompkins, on which he caused the property in controversy to be sold. At the sheriff's sale, the property was bid off by Latimer, who received the usual certificate that would, under the statute, entitle him to a deed, in case it was not redeemed. Subsequently, Latimer assigned the certificate of purchase, but to whom he does not recollect, and the evidence does not disclose. Circumstances proven would seem to warrant the inference the purchase by Latimer was in the interest of appellant, and that the assignment was afterwards made to him, but whether this is so, is not a matter of any great consequence.

Obviously, when the master's report of sale, and showing what deficiency remained, was confirmed by the order of court, made on the 25th of September, 1869, the cause passed from the docket. This would have been the ordinary course, and nothing to the contrary appears. It was reinstated at the instance of a stranger to the record, and without any notice to any adverse party whose interests were to be affected. Hence all subsequent orders in the cause were without authority of law, and therefore void.

It is doubtless true, as counsel contend, that no execution for the deficiency could properly issue until after the "coming in and confirmation" of the master's report; but no order had previously been made for an execution against Tompkins alone, and none was then made. Months elapsed before the court assumed to award execution against Tompkins. As we have seen, the court had then lost all jurisdiction of the cause or the persons of the parties. The sale under the execution awarded against Tompkins being void, there was nothing from which appellant could redeem. Hence it follows, as a deduction from the premises, the redemption being unauthorized by statute, appellant acquired no title to the property redeemed and re-sold on his execution.

Upon the whole record, we are of opinion the decree of the court below is just and equitable, under the evidence, and is warranted by the law.

Decree affirmed.

IRA BROWN

v.

RICHARD C. ROUNSAVELL.

1. CONTRACT—*mutuality.* Where the obligee in a bond grants the right to purchase certain machines of him, to be re-sold within certain territory, and agrees to furnish the same at a discount, on a credit of six months, and a bond is given to him to secure payments for machines sold, it will not be void for want of mutuality.

2. SAME—*in restraint of trade.* A contract to furnish a party with sewing machines at a discount, and upon a credit, which provides that such party shall deal exclusively in the machine sold by the party agreeing to furnish, and to purchase the same of him exclusively, contains no such restraint of trade as to render it void.

3. PLEADING—*variance.* In a suit upon a bond for a breach of its conditions, where there was also a contract between the principal in the bond and the obligee, respecting the sale of sewing machines, the declaration showed that, by the contract, the obligee in the bond reserved the right to make sales in the territory named, while the condition of the bond showed that the other party had the exclusive right of purchasing from him the machines: *Held*, that there was no fatal variance, as the suit was upon the bond only.

4. VERDICT—*action of court as to form.* Where the verdict of a jury is not in form, mere irregularity in the proceedings of the court in having the same put in form, as in oral remarks and instructions which could not have affected the finding of the jury, except as to the mere form of the verdict, will not be sufficient error to reverse.

5. COURTS OF COOK COUNTY—*whether held by one or more judges.* Although the *placita*, or convening order, sent up in a record from the circuit court of Cook county, may show that the five judges were present and sitting, together with another assistant judge, yet if the bill of exceptions shows that the cause was tried by the latter judge alone, the judgment will not be reversed for the defect in the *placita*.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Mr. CHARLES J. BEATTIE, for the plaintiff in error.

Mr. CHARLES B. WELLS, for the defendant in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of debt on a penal bond, brought by Rounsavell, the defendant in error, against the plaintiff in error, Brown, and Hanson, Wulf and Farrart, the obligors in the bond.

The declaration recites that Hanson and Wulf, on September 4, 1871, made an agreement with Rounsavell, by which the latter granted to Hanson and Wulf the right to purchase from him the Ætna sewing machine and accessories, for the sale thereof within the county of Cook, he reserving the right to canvass and sell in said territory.

In consideration of which agreement, Hanson and Wulf agreed to deal exclusively in the Ætna sewing machines and accessories sold by Rounsavell, and to purchase their supply of the machines from him; that Rounsavell agreed to furnish the machines and accessories to Hanson and Wulf at a discount from Chicago retail prices of thirty per cent, on six months' time; that Hanson and Wulf agreed to pay Rounsavell for all machines and other articles that they might purchase, in cash, within six months from the time of purchase, and to balance their account monthly, either by cash or notes.

And then the declaration avers that, at the same time, Hanson, Wulf, Brown and Farrart, for the purpose of securing to Rounsavell the performance of the contract, made to Rounsavell the writing obligatory sued on, which was in the penalty of $5000, and subject to the following conditions:

"That whereas, by agreement of even date herewith, said Hanson and Wulf have been granted by said Richard C. Roun-

savell the exclusive right to purchase from him the Ætna sewing machines and accessories, to be sold by said Hanson and Wulf within the county of Cook, and State of Illinois: Now, if the above bounden Hanson and Wulf shall well and truly account and pay for all machines, goods and chattels, of every kind sold to them by said Richard C. Rounsavell, and shall well and truly pay, at maturity, all notes given by them to said Richard C. Rounsavell, to the amount of $5000, in payment for sewing machines, their accessories, etc., as stipulated in said agreement which is hereto annexed, then this obligation shall cease and be void, otherwise to remain in full force and virtue for one year from this date."

Then follow averments that, from and after that date, for one year next following, Rounsavell sold to Hanson and Wulf a large quantity of Ætna sewing machines and accessories, under the contract, of the value of $15,000, and that Hanson and Wulf had not paid for the same in cash or notes, nor balanced their account monthly, nor accounted for the machines, etc.

The plaintiff recovered a verdict and judgment for $5000 damages. Brown, one of the defendants, prosecutes this writ of error.

It is objected that the contract is void for want of mutuality, and for being in restraint of trade, and that there is a variance between the contract secured by the bond and the contract recited in the bond.

We see no want of mutuality. There were stipulations by each party. Rounsavell granted the right to purchase from him the sewing machines, for the sale thereof within Cook county, and agreed to furnish the same at a discount from Chicago retail prices of thirty per cent, on six months' time.

Because the contract restricts Hanson and Wulf to deal exclusively in the Ætna sewing machines sold by Rounsavell, and to purchase their supply of him, it is claimed to be in restraint of trade, and therefore void. We see nothing in such a contract so in restraint of trade as to make it, in that

respect, against public policy, and require that it should be adjudged void. We know of no warrant of authority therefor.

The alleged ground of variance appears to be this: that the contract, as recited in the condition of the bond, gives to Hanson and Wulf the *exclusive* right to purchase the machines from Rounsavell; whereas, the contract, as it is set forth to be in the recital of the declaration, reserves the right to Rounsavell to canvass and sell the machines in the territory of Cook county, thus showing the right not to be *exclusive* in Hanson and Wulf.

This, at most, would only be a misdescribing of the contract in a particular of description, presenting no fatal objection of variance.

But the sufficient answer to all these objections is, that the suit is upon the bond, and not upon the precedent agreement out of which the bond grew. It is for a breach of the condition of the bond in not paying for the machines purchased "as stipulated in said agreement," and the only necessity of any reference to the agreement, was, to ascertain how the machines were stipulated to be paid for in the agreement.

The points of objection do not touch the agreement in this respect.

The next objection taken is, on account of the action of the court with respect to the jury. The record shows the following proceedings in that regard: that the jury brought in a sealed verdict, which was for $5575 damages, and the plaintiff, under the suggestion of the court, entered a *remittitur* for $575. The defendants excepted to the verdict as not being in due form, whereupon the court returned the verdict to the jury, and instructed them orally that, if they found for the plaintiff, they should find only the amount of the penalty of the bond as debt, and that, if they so found, they might assess damages to the amount of $5000, and no more; and that, if they found for the plaintiff, they should find the debt due the plaintiff $5000, at any event, to which defendants

excepted, because it was oral, and thereupon the judge drew up, in writing, and read to the jury, the following instructions, to wit:

"1. The jury are instructed that, in the form of their verdict in this case, they should, if they find for the plaintiff, find the penalty of the bond as debt, and then assess damages at such an amount as they think the plaintiff ought to recover, not exceeding five thousand dollars damages.

"2. The verdict of the jury in this case may be in the annexed form, if for the plaintiff: We, the jury, find the issues for the plaintiff. We find the amount of debt due the plaintiff to be five thousand dollars, and assess the plaintiff's damages at —— thousand dollars."

To the giving of which instructions the defendants excepted.

The jury again retired, and afterward brought in again a written paper as their verdict, and thereupon, on inspection by the court, and the statements by the jury that the amount of damages stated in their verdict was the amount they found due the plaintiff, the judge orally instructed the jury that their said verdict was wrong, in that it found the debt as $5000, and the damages assessed at $575, provided they intended to give the plaintiff, in all, a larger amount in damages; to which oral instruction the defendants excepted. The jury were then again ordered to retire and consider of their verdict. One of the jurors, while the others were leaving the room, remained, and, out of the hearing and in the absence of the other eleven, entered into a conversation with the judge, and inquired in reference to the allowance of interest, and thereupon the judge orally stated the law, in substance as he had before stated it to the whole jury orally and in his written instructions; to which the defendants excepted; and the jury afterward brought in their verdict again for the plaintiff, finding the debt due him $5000, and assessing his damages at $5000.

The jury being inquired of by the court if that was their verdict, and there being some difference of opinion among them on that point, the judge, against the objection of the defendants, gave the jury the following instruction:

That if they find for the plaintiff, it is their duty to find, first, as debt, the amount of the bond offered in evidence, to wit: $5000, and to find as damages the amount they believe, from the proofs, the plaintiff ought to recover. As the plaintiff can not in this case have execution to collect the debt, but only for the damages, they should assess as damages the whole amount they think he is entitled to have, and not merely the interest on such amount. To which, and the giving of said instruction, the defendants excepted, and thereafterward the jury returned and brought in their verdict as last above named as found by them.

Although there was somewhat of irregularity in these proceedings, we perceive nothing in them which, under the circumstances, should be held sufficient ground for reversing the judgment. We can not think there was anything in them which could have had any effect whatever upon the jury, save in the framing of the form of their verdict.

It is the provision of the statute that the clerk shall enter the verdict of the jury in form, under the direction of the court. The execution of the bond was not put in issue by any plea verified by affidavit; so its execution stood admitted. The only thing in issue before the jury was, whether there had been a breach of the condition of the bond, and if so, then the amount of the damages. If the jury found there had been such breach, then it followed, of course, that the finding of the debt should be the penalty of the bond—$5000. It was improper, in the form for a verdict which the court gave to the jury, to name in it "—— thousand dollars," as that was an intimation that the amount of the damages should be at least $1000. The form should have been entirely blank as to the amount of damages. But, as the amount of the damages had been already found by the jury

to be $5575, it is not to be supposed that such intimation had any influence upon the finding of the jury as to the amount of the damages, and especially when the subsequent findings of the jury show their determination to give the plaintiff the same amount as in the first instance.

It was apparent to the court that the jury found the plaintiff's damages to be $5575, and that that was the sum they intended to give him as his actual recovery; but, from their unacquaintance with form, they had not made the finding, which in this case was formal, of the debt of $5000. It belonged to the province of the judge, in presiding over the trial, to see that the real finding of the jury was not defeated, in its force, by a defect in its form; and we can not think that the action of the court had any other effect than to assist the jury in shaping the actual verdict which had been found by them, into proper form.

It is assigned for error that the record shows that all of the five judges of the Cook circuit court were present and sitting, together with Hon. W. W. Heaton, judge of the third judicial circuit, as assistant judge, in the trial of the case.

Looking merely at the *placita*, this might so appear. As the constitution provides "that Cook county shall be one judicial circuit," that "the circuit court of Cook county shall consist of five judges, until," etc., the *placita*, showing the organization of the court at the term, does mention all such judges as present; but, although the *placita* be not in proper form, as this court has heretofore said, the bill of exceptions shows that the cause was tried before Hon. W. W. Heaton, judge of the third judicial circuit, and the judgment entry upon the record shows that the motion for a new trial came on to be heard before that judge, and that the motion was overruled, and the judgment rendered by him. So that the objection does not exist, in fact, that the cause was tried before more than one circuit judge. The bill of exceptions shows the trial was had before one circuit judge,

and the judgment should not be vitiated by any defect of form that there may be in the *placita*.

Finding no error in the record that is material, the judgment will be affirmed.

Judgment affirmed.

D. E. K. STEWART

v.

THE HIBERNIAN BANKING ASSOCIATION.

1. JURISDICTION—*acquired by entry of appearance under power of attorney.* In a suit against two, where there is service on one, only, and the appearance of the other is entered under a power of attorney authorizing the attorney to enter appearance, waive service and confess a judgment, the court has jurisdiction and can proceed to judgment.

2. In such case, the fact that the attorney only enters the appearance and waives service, without confessing judgment, but allows a jury to hear evidence and return a verdict, is not such a departure from the authority conferred by the power, as will render all the acts done under it erroneous.

APPEAL from the Circuit Court of Cook county; the Hon. JOHN G. ROGERS, Judge, presiding.

Mr. WILLIAM L. MOSS, JR., for the appellant.

Mr. A. M. RORKE, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

Appellee recovered a judgment in the circuit court of Cook county, against D. E. K. Stewart and Joseph Fitzpatrick, upon a promissory note. Stewart alone appealed, and seeks to obtain a reversal of the judgment, solely upon the ground that the court had no jurisdiction by service of process or otherwise over his co-defendant, Fitzpatrick.

The original record filed in this cause does not show service of process upon Fitzpatrick, or that his appearance was

entered, but, by an amended record filed since the cause has been pending in this court, it does appear that, on the 11th day of February, 1875, and before the judgment was rendered, the appearance of Fitzpatrick was entered by Andrew M. Rorke, his attorney.

It is, however, claimed by appellant that Rorke, the attorney of Fitzpatrick, had no authority to enter such an appearance as was entered in the cause.

We do not regard this position well taken. The record shows a power of attorney was filed with the note upon which judgment was rendered, executed by Fitzpatrick, by which he authorized and empowered Geo. F. Bailey, or any attorney of any court of record, to appear in any court of record, in term time or in vacation, in any of the States, at any time after the maturity of the note, to waive the service of process and confess a judgment in favor of the payee of the note for the full amount of the note and interest.

The power of attorney confers full authority to do three things: 1st. To appear for Fitzpatrick; 2d. To waive the service of process, and 3d. To confess a judgment upon the note for the amount due thereon.

It can not be denied that the attorney possessed the power to waive service of process and confess a judgment upon the note in a court of record. The argument of appellant, however, is, as the attorney did not confess the judgment, the appearance that was entered and the waiving of the service of process, did not confer upon the court jurisdiction over the person of Fitzpatrick.

We are unable to appreciate the force of the argument. The fact that the attorney did two acts authorized by the power of attorney, but, instead of confessing the judgment, which was the third act authorized, allowed the jury to hear the evidence and return a verdict for the amount of the note and interest, can not be regarded such a departure from the authority conferred by the power of attorney, as to render all the acts done under it erroneous.

The position of appellant might be regarded with more favor, if it appeared that Fitzpatrick had been injured by the act of his attorney. Such, however, is not the case. On the other hand, he makes no complaint, but seems to be entirely satisfied with the acts of his attorney and the judgment of the court.

It is, however, insisted that, as the power of attorney was more than a year and a day old, the law required an affidavit to be filed, to prove the execution of the power of attorney, and to establish that Fitzpatrick was then alive.

The record furnishes no information in regard to the nature or amount of evidence heard by the court at the time the judgment was rendered; it contains no bill of exceptions, except in the motion to amend the record. We will, therefore, presume the evidence offered and considered sufficient to authorize the judgment.

Under the authority, however, of *Rising* v. *Brainard*, 36 Ill. 80, and *Stuhl* v. *Shipp*, 41 ib. 134, proof of the execution of the power of attorney, or that Fitzpatrick was then alive, was unnecessary.

As we perceive no error in the record, the judgment will be affirmed.

Judgment affirmed.

JOHN WARNE *et al.*

v.

BYRON KENDALL.

1. GARNISHMENT—*issue should be made as between the defendant in attachment and the garnishee.* It is irregular to make up and try an issue between a garnishee and the attaching creditor. The issue should be between the defendant in attachment and the garnishee.

2. SAME—*form of judgment.* No judgment can be rendered against a garnishee in favor of the attaching creditor, but it must be in favor of the

defendant in attachment, which will stand as a security or fund, in which other attaching creditors may participate.

3. SAME—*indebtedness on negotiable note.* Where a garnishee has given a negotiable promissory note to the defendant in attachment, which is assigned before its maturity, he will not be indebted to such defendant, but to the holder, and will not be liable to garnishee process in the attachment.

APPEAL from the Circuit Court of Kane county; the Hon. H. H. CODY, Judge, presiding.

Messrs. BOTSFORD, BARRY & WILCOX, for the appellants.

Mr. J. H. MAYBORNE, for the appellee.

Mr. JUSTICE BREESE delivered the opinion of the Court:

We are unable to discover, from this record, any right appellee has to retain the judgment rendered in his favor by the circuit court of Kane county.

It appears appellee had brought his action at law against Rosina Brown, and sued out a writ of attachment in aid thereof, which was served on appellants, but no property was attached. Appellee recovered judgment against Mrs. Brown.

Appellants, as garnishees, answered interrogatories. An issue was made up, and tried by a jury, who found a verdict for appellee.

It would appear the issue was between appellee and appellants, on garnishee process. This was irregular, as this court has repeatedly held. The issue should have been between Rosina Brown and appellants, they being alleged to be her debtors. *Gillilan* v. *Nixon*, 26 Ill. 50, referring to *Stahl et al.* v. *Webster et al.* 11 ib. 511; *Farrell* v. *Pearson*, 26 ib. 463; *Rankin* v. *Simonds*, 27 ib. 352; *Cariker* v. *Anderson*, ib. 358; *Towner* v. *George*, 53 ib. 168.

The garnishees owed appellee nothing, and, of course, no judgment should be rendered against them in his favor. It should have been in favor of Mrs. Brown, if it had been proved they were indebted to her at the time process was

served upon them. The judgment against the garnishees in favor of the debtor, in the attachment cause, stands as security or as a fund, in which other attachment creditors may participate.

But, waiving this, we fail to find any evidence tending to prove that appellants, or either of them, were indebted to Mrs. Brown at the time summons in garnishment was served upon them, nor did they, or either of them, become liable by purchasing the lease, and executing a negotiable note therefor in part payment, as it appears this note was assigned to the bank before its maturity, and the makers thereby became the debtors to the bank.

The question was not, when the lease was bought of Dawson, but, when the summons was served, were appellants the debtors of Mrs. Brown. That they were not, is clear.

The judgment is reversed.

Judgment reversed.

SARAH G. MORSE

v.

ELLEN THORSELL.

1. EVIDENCE—*hearsay.* On petition for dower, where the record failed to show a legal title in the husband of the petitioner, she, for the purpose of showing an equitable title, testified that her husband purchased the land, and that both he and the vendor told her that the husband paid the entire purchase money, and that, on a sale by the latter, the vendor conveyed to the purchaser: *Held*, that what she was told by her husband and his vendor was hearsay evidence, and should have been excluded on objection.

2. DOWER—*in land held under contract to purchase, which is assigned before payment.* If a vendee, before he makes full payment, and before he is able to enforce a conveyance of the land, assigns his contract, and the assignee completes the payment and obtains a deed, the widow of the first purchaser will acquire no right of dower in the premises.

3. And if the first purchaser, after assignment of his contract, completes the payment with the money received for his assignment, the result will be the same as if the assignee had made the payment to the original vendor, and the widow of the original vendee will have no right of dower.

4. SAME—*allegation in petition respecting title, construed.* An averment in a petition for dower, that petitioner's husband was seized in fee simple of the land, will import that he held the legal title; but if this is followed by the words: and was the owner of the equitable title to the lot in controversy, they will limit the prior allegation, and, when taken together, import that he owned the lot by an equitable title in fee simple.

5. PARTY—*on petition for dower.* On petition for dower, against a lot owned by a married woman, whose husband has an interest therein by the curtesy or otherwise, the husband is a necessary party defendant.

6. SAME—*person made a party defendant will be presumed to have an interest.* If, in a proceeding for dower in land of a married woman, her husband is made a defendant with her, it will be presumed he has an interest, and he will have the right, without disclosing his interest, to put the petitioner upon proof of the title alleged to be in her husband.

APPEAL from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. LANPHERE & BROWN, for the appellant.

Mr. JUSTICE WALKER delivered the opinion of the Court:

At the September term, 1874, of the Knox circuit court, appellee filed her petition to have dower assigned to her in premises held by appellant. She made appellant and her husband parties to the proceeding. He filed an answer, and she filed two pleas. The first denies that the husband of appellee ever had a fee simple title to the premises, or a legal fee therein, and if he had any interest, it was but equitable. The second plea averred that appellant was a *bona fide* purchaser without notice, and for full value. The husband denies, in his answer, that the husband of petitioner was ever seized of either a legal or an equitable estate in the premises.

To the first of appellant's pleas a replication was filed, and also to the answer of her husband. Appellee demurred to

the second plea, and the court held it bad, and appellant abided by her demurrer. A trial was had on the answer and the first plea, and the court found that appellee was entitled to dower in the premises, and appointed commissioners to assign the same. They reported that the premises were not susceptible of division, without manifest prejudice to the parties.

Thereupon a jury was impanneled to assess the damages, and to ascertain the sum that should be paid annually by appellant in lieu of dower. They found the damage for withholding the dower at $125, and that the annual sum of $25 be paid to appellee by appellant. A decree was rendered accordingly, and an appeal was prayed and perfected.

The evidence on this question is scant. Appellee is the only person who testified in regard to the ownership by her husband. She testified that her husband purchased the lot of Hawkinson and Ockenson about twenty years ago, and at once erected a house on it, and he and she lived in it three or four years; that her husband sold it to Matthew Lynch; that the deed was made from Hawkinson and Ockenson to Lynch, but she does not know the reason why it was so made; that her husband paid for the lot when he bought it; that when her husband sold to Lynch, the latter gave a mortgage back to secure $650, she thinks. On her cross-examination, she says she knew that her husband paid for the lot, because he told her so, and Hawkinson and Ockenson told her the same; that she was not present when her husband paid the money. She stated, in answer to a question whether her husband paid all of the money before he sold to Lynch, that her husband, when he got the deed, sold to Lynch, and got the money of him to pay and get the deed, and then he sold the deed to Lynch. She testified that her husband purchased about twenty years since, and sold to Lynch eighteen or nineteen years ago.

When we take into consideration the fact that the chain of title fails to show that Thorsell ever had any interest of

any kind in this land, and that this is an effort to prove that Thorsell had, previous to appellant's purchase of Lynch, held an equitable estate of inheritance in fee to these premises, it would seem clear that it falls far short of the requisite clearness for the purpose. Title to real estate, when admissible by verbal evidence, can only be established when it is clear and satisfactory. Here, appellee testified that her husband paid the purchase money for the lot, but her cross-examination shows that she only knew so because her husband and his vendors told her so, and not from any knowledge of her own. This was hearsay evidence, was objected to on the trial, and should have been rejected.

Strike out this evidence of payment, and the remainder of her testimony fails to prove any payment, or anything that even renders it probable that her husband paid the purchase money. On the contrary, it would rather lead to the inference that Thorsell made the purchase, and may have paid something on it, and, after occupying it for a time, sold his purchase to Lynch, and, on procuring a deed from his vendors to Lynch, he paid him part of the money on the delivery of the deed, and out of the proceeds paid his vendors, and held the remainder.

We regard it as improbable that Lynch gave any mortgage back to Thorsell, but altogether probable that he may have executed one to Hawkinson and Ockenson for the balance of the purchase money.

It is probable that the true state of the transaction can not be known, unless Lynch, Hawkinson or Ockenson shall be called as a witness. But if the facts are as we have suggested, there can be no pretense that Thorsell ever held an equitable title which he could have converted into a legal title by a bill for a specific performance. He, as we suppose, only held a contract, which was not performed, nor did he ever perform it. He, no doubt, sold the contract to Lynch, and Lynch performed it by paying all, or at least the balance, of the purchase money. If Lynch purchased the agreement and

performed it, he became invested with both the legal and equitable title by the conveyance from Hawkinson and Ockenson.

As has been held in numerous cases in this court, if a vendee, before he has made full payment, and before he is able to enforce a conveyance of the land, assigns his contract, and the assignee completes the payment and obtains a deed, the widow of the first purchaser has no right to dower in the premises. To so hold would be inequitable. It would be to hold that the payment of the money by one person would confer the right to dower on the wife of another person. Such a case is destitute of all equity or justice. In a case where a widow claims dower in lands because her husband held an equitable estate of inheritance, it must appear that her claim is just and equitable. It may be different where her claim is to dower in a legal title.

If, as we suppose, Lynch paid the purchase money, or a portion of it, to Thorsell's vendors, under an assignment of the contract, and received a deed from them, he was, in fact, the actual purchaser, and not Thorsell. If Thorsell did not pay the purchase money, or if he sold his contract and thereby obtained the money from Lynch, and then paid the balance, this would virtually be a payment by Lynch, and appellee would acquire no rights thereby. The entire evidence considered, we think appellee has signally failed to prove such a title as gave her dower in the premises.

It is, however, urged that appellant has, by her first plea, admitted away her case by insisting that Thorsell did not own a legal title to the lot at any time in his lifetime. It is true that this plea may have been immaterial, as the allegation in the petition is, that Thorsell was seized in fee simple, and was the owner of the equitable title to the lot in controversy. The averment that he was seized in fee simple, had it been the only averment, would have implied that he held the legal title; but the subsequent averment, that he was the owner of the equitable title, limited the first allegation, and

makes the allegation, when taken together, that he owned the lot by an equitable title in fee simple. But admitting that the plea was immaterial, as it traversed no allegation in the petition, still the answer of the husband of appellant denies that Thorsell held either a legal or an equitable title to the premises, and that put her on proof of her title.

The husband of appellant was deemed a necessary party to cut off any interest he may have had in the premises, by the curtesy or otherwise, and if he had such an interest, he was an indispensable party. And as petitioner made him a party, until it otherwise appears we will presume he has an interest, and if so, he undoubtedly had the right, without disclosing his interest, to put appellee upon the proof of the title she alleged her husband held in the premises. This he did, and we have seen that she has failed to make the proof. In this view of the case, we deem it unnecessary to discuss the question, whether appellee's second plea presented a defense to appellant's claim to be endowed in an equitable estate.

The decree of the court below is reversed and the cause remanded for further proceedings, and with leave to appellant to amend her first plea, if she shall be so advised.

Decree reversed.

WILLIAM GOLDIE

v.

ALEXANDER MCDONALD *et al.*

1. PRACTICE—*time of filing affidavit of claim.* An affidavit of claim filed more than ten days before the convening of the court for the term at which the declaration is filed, will be regarded as having been filed "with the declaration," within the meaning of the statute.

2. SAME—*amendment.* Where an affidavit of claim, filed with the declaration, was sworn to before a notary public of another State, it was not error to permit an additional certificate made by such notary, that, by the

laws of such State, he was authorized to administer oaths, to be filed by way of amendment.

3. SAME—*plea without affidavit of merits—when stricken from files.* Where an affidavit of claim was filed with the declaration, and the defendant was allowed full five days within which to file an affidavit of merits with his plea, and failed to do so, it was proper to strike the plea from the files, and render judgment against the defendant, as upon default.

4. SAME—*presumption as to residence of defendant.* A defendant will be presumed to be a resident of the county in which he was served with process, within the meaning of sec. 37 of the Practice Act, Revised Laws 1874, until, in some appropriate manner, it is made to appear, from the evidence, he is not.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. BONFIELD, SWEZEY & SMITH, for the appellant.

Mr. JOHN A. OWEN, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The amendments permitted to be made to the pleadings in this case, were all within the discretion of the court. An affidavit of claim filed more than ten days before the convening of the court for the term at which the declaration is filed, will be regarded as having been filed "with the declaration," within the meaning of the statute on that subject. R. S. 1874, p. 779, sec. 37.

It was proper for the court to permit the additional certificate of the notary public to be filed, showing that, under the laws of the State of Wisconsin, he had authority to administer oaths. The amendment to the certificate of the notary to the affidavit of claim, it being under his official seal, made it *prima facie* evidence, under the statute, that the oath required by law to be made, was taken before such officer. R. S. 1874, sec. 6.

Although allowed five days for that purpose, defendant filed no affidavit of merits with his plea, and hence, under

the statute, it was properly stricken from the files, and judgment rendered against him as upon default.

It will be presumed, defendant was a resident of the county in which he was served with process, within the meaning of the statute under which plaintiff's damages were assessed, until, in some appropriate manner, it is made to appear, from the evidence, he was not a resident of the county in which he was served, and in which the action was pending. R. S. 1874, p. 779, sec. 33.

The judgment of the court below must be affirmed.

Judgment affirmed.

ALFRED PATMOR

v.

GEORGE W. HAGGARD *et al.*

1. STATUTE OF FRAUDS—*promise to answer for debt, etc., of another.* As respects any promise to answer for the debt, default or miscarriage of another person, the *promise* is required by the Statute of Frauds to be in writing, but the writing need not state the consideration of the promise.

2. SAME—*contract for sale of land.* The provision of the Statute of Frauds of 1869, that a contract for the sale of land shall be in writing, requires the consideration as well as the promise itself to appear in writing. Under the revision of 1874 the rule is different.

APPEAL from the Circuit Court of Iroquois county; the Hon. N. J. PILLSBURY, Judge, presiding.

Messrs. BLADES, KAY & EVANS, for the appellant.

Messrs. ROFF & HARRIS, for the appellees.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action of assumpsit, brought by Patmor against Haggard and Kane, June 6, 1874, upon an instrument

in writing, which is set out in the declaration, *in hæc verba*, as follows:

"Know all men by these presents, that Geo. B. Haggard and Morris Kane, of Concord, Iroquois county, Ill., are held and firmly bound unto Alfred Patmor, of the same town, county and State, in the sum of $1000, good and lawful money of the United States, to be paid to the said Alfred Patmor, his executors, heirs and assigns, and every of them, by these presents. Sealed with their seals this 6th day of December, 1873.

"The condition of the above obligation is such, that if the said George W. Haggard shall furnish to the said Alfred Patmor a good and sufficient warranty deed to the north-west quarter of section 7, town. 27 north, of range 11 west, of 2d P. M., and upon the said deed being furnished as above specified, then this obligation to be null and void.

"G. W. HAGGARD,
"MORRIS KANE."

The declaration avers, that the instrument was executed for the consideration of $800, in goods, wares and merchandise, delivered to Haggard; that Haggard had not executed the deed, although requested to do so, to the plaintiff's damage of $1000.

The third plea was one on the part of Kane, that his promise was to answer for the default of Haggard, and that no agreement, nor any note or memorandum thereof, wherein the consideration of the same is stated, was or is in writing, etc.

The fourth and fifth pleas were on the part of both Haggard and Kane, alleging that the promises were for the sale and conveyance of the land in the declaration mentioned, and that no contract, or any note or memorandum thereof, was or is in writing, wherein the consideration is stated.

A general demurrer to these pleas was overruled by the circuit court, and, the plaintiff electing to stand by his de-

murrer, judgment was rendered for the defendants, and the plaintiff appealed.

As respects the third plea, we see no room to question that, under our Statute of Frauds, the consideration of such an agreement as is therein alleged need not appear in writing. It is only necessary that the promise should be in writing. Such is the plain reading of the statute. The words are, that "no action shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; * * * or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing," etc. As respects any promise to answer for the debt, default or miscarriage of another person, it is the *promise*, only, that the statute requires to be in writing.

The demurrer should have been sustained to the third plea.

As respects a contract for the sale of lands, the language of the statute is different.

The act of March 27, 1869, (the one in force at the time of the making of this instrument in writing and the bringing of the suit,) was as follows: "That no action shall be brought whereby to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless the said contract, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized, in writing." Laws 1869, p. 363.

This requires the contract, or some note or memorandum of the contract, to be in writing. The English statute of

frauds, requiring, in case of a promise to pay the debt of another, that the agreement should be in writing, received a construction as to the import of the word agreement, in the case of *Wain* v. *Warlters*, 5 East, 9, where it was held, that the word agreement is not satisfied unless there be a consideration, which consideration, as forming part of the agreement, must appear in writing, as well as the promise itself, where the requirement of the statute is that the agreement shall be in writing.

In this country there is a conflict among the decisions of the courts of different States, in regard to the construction of the term "agreement," where the requirement of their statutes is, that the *agreement* shall be in writing—some holding that only the promise need be in writing, others, that the consideration, as well as the promise, must be expressed in writing. A collection of the decisions upon this point in different States will be found in Browne's Statute of Frauds, sec. 391. The preponderance of authority is in favor of the construction adopted in *Wain* v. *Warlters*, that the consideration, as forming part of the agreement, must be in writing.

Our statute of 1869 was passed in view of the various well known decisions upon this point, and, from the legislature adopting in that act the word "contract," instead of "promise," requiring that the contract, not promise, for the sale of lands should be in writing, it may well be supposed that they intended to adopt the word with the prevailing construction which had been placed upon the term "agreement" in this connection, as embracing the consideration as well as promise.

Contract may be said to be a broader term in this regard than agreement, and to more imperatively demand the construction that it embraces the consideration. A contract would seem to import something more than an agreement. It is defined to be "an agreement upon sufficient consideration to do or not to do a particular thing." A consideration is a necessary element of a contract.

This court, in *McConnell* v. *Brillhart*, 17 Ill. 354, in considering the sufficiency of writings under the Statute of Frauds, in a case respecting the sale of land, recognizes the principle that they must contain enough on their face, or by reference, to fix the names of the parties, the description of the property, and the consideration to be given. This was under the statute prior to 1869, requiring the agreement to be in writing.

In the revision of 1874, the act of 1869 is retained entire, but, in the section following, it is expressly provided, that the consideration need not be expressed in the writing, but may be proved by parol. This went into effect after the time of bringing the suit.

We are of opinion that the provision of the statute of 1869, that the contract for the sale of land should be in writing, required the consideration for the promise, as well as the promise itself, to appear in writing, and that the demurrer was properly overruled to the third and fourth pleas, which would entitle the defendants to their judgment, although there was error in overruling the demurrer to the third plea, the record disclosing one good answer to the declaration, which is admitted by the demurrer.

The action is not brought for the recovery of the money named in the written instrument, but for the breach of contract in not conveying the land.

The judgment must be affirmed.

Judgment affirmed.

ELIZA NIXON

v.

JOHN HALLEY.

1. PRACTICE IN SUPREME COURT—*remittitur*. If a party in this court remits the amount of a particular item of account included in his judgment, this will obviate any conceived error in refusing an instruction relating to such item.

2. COSTS—*remittitur in Supreme Court.* Where the defendant below brings the cause to this court, and the plaintiff remits here a portion of the judgment, which was one of the grounds of error assigned, the party thus entering the *remittitur* will be required to pay all the costs which had accrued in this court up to that time.

3. MARRIED WOMEN—*liability on their contracts—estoppel.* If a married woman is in the possession of property, claiming to own and controlling the same, and, on her declaration of ownership, employs a party to make improvements on the same, under the belief that it is her separate property, she will be estopped from denying that she owned the same, when sued for the value of the labor performed.

4. It is sufficient, to make a married woman liable, that she is in possession of real property, claiming to own the same in her own right, and, as such, employs another to perform labor upon the same. In such a case, it is wholly immaterial whether she has any title to the same or not.

5. LEX LOCI. The validity of a contract of a married woman, in respect to her separate property, or property claimed by her, is determined by the laws of the State where the same is made.

WRIT OF ERROR to the Circuit Court of DeKalb county; the Hon. THEODORE D. MURPHY, Judge, presiding.

Mr. R. L. DIVINE, and Mr. JOHN J. MCKINNON, for the plaintiff in error.

Mr. H. A. JONES, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of assumpsit, brought by John Halley, against Eliza Ball, to recover a certain sum of money claimed to be due for labor performed and goods furnished, in the years 1861 and 1862, in the State of Iowa.

A trial of the cause was had before a jury, which resulted in a judgment in favor of the plaintiff, to reverse which the defendant has brought this writ of error.

On the trial, the defendant requested the court to give to the jury the three following instructions:

"The jury are instructed, as matter of law, that the items in plaintiff's bill of particulars in this case, of $17.40, bal-

ance of an old account, can not be recovered for in this case, in the absence of testimony to show that it originally accrued under or by means of a contract relating to the defendant's separate property.

"Although the jury may believe, from the testimony, that, at the time of the making of the alleged contract between plaintiff and defendant to render services upon the dam or mill property in Iowa, and to furnish material and labor for the same, the defendant claimed and represented herself to be the owner of such dam and mill property, still the defendant in this suit has the right to show that she was not such owner in fact; and if the testimony fails to show she was such owner in fact, or that some other person was such owner at that time, then, as to all such services, labor and materials, the jury should find for the defendant.

"Unless the testimony in this case shows that, at the time of the alleged contract for the rendition of services and furnishing of materials and labor by the plaintiff, for the defendant, upon the dam or mill property in Iowa, the defendant was in fact the owner of such dam and mill property as her own separate estate, then, as to all such services, labor and materials, the jury should find for the defendant."

These instructions the court refused, and the decision of the court is relied upon as error.

The plaintiff, since the cause has been pending in this court, has remitted from the judgment recovered that portion of the account mentioned in the first refused instruction, which obviates the necessity of considering the decision of the court in its refusal.

In order to comprehend fully the questions involved in the second and third refused instructions, and their legitimate bearing in the case, a brief reference to the leading facts becomes necessary.

It appears, from the record, that the defendant was the wife of one Daniel H. Ball; that the mill property upon

which the plaintiff performed the labor, to recover for which this action was instituted, was at one time owned by James A. Ball, a son of defendant's husband. In the spring of 1859, John A. Ball, after having mortgaged the property, moved to California, and never returned. In the fall of 1861, it became necessary to make certain repairs on the dam of the mill property, and Daniel H. Ball went to Iowa to the property, from his residence in this State, for the purpose of making the repairs. Upon his arrival, he had an interview with the plaintiff, and employed him to work a few days on the property, until the defendant should arrive. Other hands were employed, and a family placed in the mill house to board the hands.

In a few days, the defendant followed her husband. Upon her arrival, as was clearly established by two witnesses, she discharged the family her husband had placed in the mill house; declared she was the owner of the property; that her husband was only her agent; she employed the plaintiff and his wife to move into the mill house, and requested the plaintiff to work upon the mill.

The labor was performed in the fall of 1861 and spring of 1862, and as late as 1864 the defendant, still recognizing her liability, sent the plaintiff a message, in which she declared she would pay the plaintiff, if she never paid another debt.

But it is insisted that the testimony showed that the defendant was not in fact the legal owner of the property, and the theory of the second and third refused instructions was, if she was not in fact the legal owner, then no recovery could be had.

This position can not be maintained. The defendant was in the actual possession of the property. She held herself out to the world as the owner. She declared her husband to be her agent, which declaration he confirmed. She claimed, directed and controlled the premises as her own separate property. She is now estopped from denying title, when sued

by one induced to labor on the faith of her representations and declarations.

The defendant being in the possession, claiming to own the property, so far as the rights of her employees are concerned it was of no consequence whether she in fact owned the property or not.

It can not be expected that, every time an employee of a married woman sues for a day or a month's labor, performed, at her request, upon a farm in her possession, and claimed to be her own separate property, he will come prepared to establish title to the farm upon which he labored, in his employer, and yet the principle announced in the instructions, carried to its legitimate results, would require such to be done.

The plaintiff could not be expected to know whether the legal title to the property was in the defendant, or whether she had a mere equity, or whether in fact she had any subsisting title in the premises. It was sufficient, for the purposes of this case, that she was in the possession, and claimed to be the owner in her own right, and, as such, employed the plaintiff, and caused the labor to be performed.

It therefore follows that the defendant's instructions were properly refused.

The contract under which the plaintiff performed the labor was made in the State of Iowa, where the rule of the common law that a married woman can not bind herself by contract, in relation to her own property, is not in force.

Under the statute of that State, a married woman has the power to make contracts and bind herself for services and labor performed, at her request, upon property in her possession, such as was performed by appellee. *Musser & Co.* v. *Hobart*, 14 Iowa, 248.

The evidence in regard to the employment and performance of the labor was ample to authorize the verdict of the jury.

In addition to this, it was proven, by the testimony of at least two witnesses, that, in 1864 and 1865, the defendant,

then in this State, conceded the justness of the debt, and promised to pay it.

Upon the whole record, we are satisfied justice has been done, and that no substantial error appears.

The judgment will therefore be affirmed.

A *remittitur* having been entered in this court by the defendant in error, all the costs of this court which had accrued before the *remittitur* was entered, will be taxed against him.

Judgment affirmed.

THE CHICAGO, ROCK ISLAND AND PACIFIC R. R. CO.

v.

SARAH A. CLAYTON.

1. CARRIER—*evidence of receipt of baggage.* The delivery of a baggage check by a railroad company to a passenger is *prima facie* evidence that the carrier has received the baggage it represents. Such evidence may be overcome by proof to the contrary, but the burden of proof is upon the carrier to show a non-delivery.

2. SAME—*liable if it receives baggage after giving check.* It is immaterial when baggage comes to the possession of the carrier, whether at the time the check is issued, or at a subsequent time. In either case its liability as an insurer becomes fixed in case of a loss.

3. SAME—*sufficiency of proof to show receipt of baggage.* Where a railway company received a passenger's check for baggage, which had not then arrived by another road, and gave its own check for the same, and it appeared that it surrendered the passenger's first check to the other railway company, it was *held*, that this was sufficient, in the absence of proof to the contrary, to show that the baggage was received by the company so surrendering the first check.

APPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

This was an action of assumpsit, by Sarah A. Clayton against the Chicago, Rock Island and Pacific Railroad Company, to recover the value of lost baggage. The opinion of the court states the substance of the material facts.

Mr. THOMAS F. WITHEROW, and Mr. G. S. ELDRIDGE, for the appellant.

Messrs. BUSHNELL, BULL & GILMAN, for the appellee.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

The delivery of a baggage check by a railroad company to a passenger is evidence the carrier has received the baggage it represents. *Davis* v. *Michigan Southern and Northern Indiana Railroad Co.* 22 Ill. 278. It is but *prima facie* evidence, however, and may be overcome by proof, as it has been in the case at bar, that the baggage was not, in fact, delivered to the carrier at the time the check was issued.

The only material question in the case we are considering is, whether the baggage of plaintiff subsequently came to the possession of defendant. It is immaterial when the baggage comes to the possession of the carrier, whether at the time the check is issued, or at a subsequent time. When it is once established the baggage is in the hands of the carrier to be transported to the destination of the passenger, its liability as an insurer becomes fixed, in case loss should occur.

Both parties agree that, when plaintiff reached Chicago from the East, her baggage had not arrived. She was desirous of pursuing her journey at once, to Utica. After some consultation, she surrendered the check she had received from the Fort Wayne road for her baggage, to the baggage-master of defendant's road, at Chicago, and received a check from him for it over defendant's road, on which she took passage to Utica. It was understood defendant's agent was to receive plaintiff's baggage from the former carrier so soon as it should arrive, and forward it to her at Utica.

The only controverted point in the case is, whether plaintiff's baggage did, in fact, come to the hands or the possession of defendant. Although slight, we think the evidence is

sufficient to warrant the finding of the jury that it was received by defendant.

The witness, Cook, who was the baggage agent for defendant at Chicago, says that he sent the check to the Fort Wayne depot, but the baggage never came over to defendant's depot, to his knowledge. It is known to be a general custom, that a railroad company will not deliver baggage unless the check previously given to the owner is surrendered. Notwithstanding the possession of the check, as we have seen, is evidence the baggage has been delivered to the carrier, it is not conclusive. It makes a *prima facie* case in favor of the holder, and shifts the burden of proof upon the carrier to show it was not delivered. It is distinctly proven the check was sent to the Fort Wayne road by defendant's agent, and there is no evidence that it was retained. The agent does not claim that he ever received it back. The inference is, it must have been delivered to the former carrier, and if it was surrendered, it is evidence from which the jury might fairly infer the baggage it represented was delivered to defendant, nothing to the contrary appearing.

The case, as made by the evidence, is within the principle of *Davis* v. *Michigan Southern and Northern Indiana R. R. Co. supra*, and is clearly distinguishable from *The Michigan Southern and Northern Indiana Railroad Co.* v. *Meyres*, 21 Ill. 627. In the latter case there was no evidence the baggage of the passenger came to the possession of the carrier sought to be charged. The company had undertaken to do the plaintiff in the case a friendly act, and that was the extent of its undertaking, which, of course, created no liability. Had it been shown the baggage of plaintiff, in fact, came to the hands of defendant, in that case a very different question would have been presented.

The case at bar was submitted to the jury fairly, under instructions quite favorable to defendant, and we can discover no sufficient reason for disturbing the verdict.

The judgment must be affirmed.

Judgment affirmed.

Chicago, Rock Island and Pacific Railroad Co.

v.

Patrick McKittrick.

1. Negligence—*recovery can not be sustained if the evidence fails to show.* In an action by the fireman of one railway company against another company, to recover for a personal injury caused by a collision, if there is no evidence of want of care or skill on the part of the defendant, and nothing wrong is shown on its part, but it appears that the injury was the result of reckless conduct of the engineer of the other company, the bad condition of its engine, and of running at a rate of speed prohibited by ordinance, a judgment against the defendant can not be sustained.

2. Excessive damages. In a suit against a railway company to recover for a personal injury, where the negligence of the defendant, if any, was very slight, and the plaintiff had no bones broken, and was not disabled from working for more than nine months, and the injury did not appear to be permanent, it was *held*, that $5000 damages were excessive.

Appeal from the Circuit Court of Cook county; the Hon. John G. Rogers, Judge, presiding.

This was an action on the case, by Patrick McKittrick, against the Lake Shore and Michigan Southern Railway Company, and the Chicago, Rock Island and Pacific Railroad Company, to recover damages for a personal injury, on the ground of negligence.

The opinion of the court states the substance of the material facts, except as to the extent of the injury to the plaintiff. The plaintiff's wages, at the time of the injury, was $54.50 per month. There were no bones broken, and the principal injury was to the kidneys and the straining of some ligaments. The plaintiff was unable to sit up for about five weeks, during which he suffered considerably, and was troubled with an inability to sleep. For about nine months he used crutches, but, at the time of the trial, was able to work, and the physician testified that it might take from two to four years for his recovery. It did not appear, however, that the injury

was permanent, in respect to his ability to labor and earn a livelihood.

Mr. Thomas F. Witherow, for the appellant.

Messrs. Tuley, Stiles & Lewis, for the appellee.

Mr. Justice Breese delivered the opinion of the Court:

This was *case*, in the Cook circuit court, brought by Patrick McKittrick, plaintiff, against the Lake Shore and Michigan Southern Railway Company, and Chicago, Rock Island and Pacific Railroad Company, defendants, which resulted in a verdict for the plaintiff, against the Rock Island railroad, for five thousand dollars, and finding the Lake Shore road not guilty.

The court denied the motion of the Rock Island railroad company for a new trial, and rendered judgment on the verdict, to reverse which that company appeals.

No very interesting questions are raised on the record.

The plaintiff was fireman on an engine of the Lake Shore railway company, employed by them when the accident, causing the injury of which he complained, occurred. It was about seven o'clock in the morning of October 17, 1873, at Polk street, in the city of Chicago. The engine plaintiff was on was a switch-engine, doing passengers' yard work.

The engine of the Rock Island company complained of was an engine used in running the dummy-train to Blue Island. Plaintiff had worked on his engine for a year previously, and with the engineer then in charge about eight months.

There is no evidence of want of care or skill on the part of appellant. The collision would seem to have occurred by reason of a violation of a city ordinance, on the part of the Lake Shore road. While the speed of appellant's engine was in conformity with the ordinance, that of the Lake Shore was twelve miles an hour, when, if it had been run according to the ordinance, at the speed of six miles an hour, it is

not at all probable the accident would have occurred; and it is also alleged by plaintiff that the engine of the Lake Shore road was in bad condition, and under the control of a negligent, careless and reckless person, all which was known to that company. Nothing wrong on the part of appellant's company is shown, not even that their engine was on the wrong track, where there were so many tracks.

In plaintiff's conversation with Parsons, the superintendent of the Lake Shore road, he distinctly stated, in answer to the question if appellant's engine was not on the wrong track, that he did not think she was, but the superintendent thought she was. It is not proved the Rock Island engine was out of her proper place, as the plaintiff's witness, Barney, testified, it was usual for them to come down that track every morning, to take the train out on the west track, and were going to the depot to take a train out, which they were in the habit of doing every morning.

The switchman, Jack, a witness for the plaintiff, testifies he called the attention of the driver of the Lake Shore to look out for that Rock Island engine coming down—the engine collided with. He knew it was down then, and the driver knew it—everybody in the yard knew it.

From this, we would infer the Rock Island engine was not on the wrong track, and the injury must be attributed to the bad condition of the Lake Shore engine, and the carelessness and recklessness of its driver.

But we do not decide the case upon this ground, but upon the ground, taking into consideration all the circumstances and the extent of the injury received by appellee, that the damages are grossly excessive, and can not be the result of deliberate judgment. Their extent may be accounted for on the hypothesis that the jury, commiserating the plaintiff's condition, and his adjustment with the Lake Shore road for two months' pay, thought that he had not been fairly dealt with, and, as he could get nothing more from that company, the loss should be made up by appellant; but whatever may

be the theory on which the jury found, it was not on the strength of the evidence. If any negligence can be attributed to appellant, it was not of a serious nature, and it should not be compelled to pay five thousand dollars for it.

The judgment is reversed, and the cause remanded for a new trial.

Judgment reversed.

WILLIAM R. RAYBOURN

v.

ELIZABETH J. RAMSDELL.

1. LEASE—*mere breach of contract of, does not work such forfeiture as to render tenant liable to pay for use and occupation.* Where land is leased to a tenant for a term of years, in consideration of specified improvements to be made by him, a failure on his part to make such improvements will not, of itself, work a forfeiture of the lease, and convert him into a tenant liable to pay for the use and occupation.

2. Until steps are taken to terminate such a lease, the lessee will be held to occupy under the lease, and his liability measured thereby.

3. SAME—*measure of damages.* Where land is leased to a tenant for a definite term, in consideration of improvements to be made and completed during such term, and he fails to make and complete such improvements, the lessor can only recover what it would cost to make such improvements, and the difference of the rental value of the land until such improvements could be made, after the expiration of said term.

4. In such case it is error to admit evidence to prove the difference in the rental value of the land as it was and as it would have been if the improvements had been made, for the purpose of charging the tenant with that difference, whilst he held under the lease.

APPEAL from the Circuit Court of Warren county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. PORTER & MOSHER, for the appellant.

Mr. J. W. DAVIDSON, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the Court:

The record shows that Elizabeth J. Ramsdell brought an action of assumpsit, in the Warren circuit court, against Wm. R. Raybourn, on a lease for the rent of a quarter section of land, for the term of seven years, and expiring on the last day of February, 1873. The declaration contained a special count, assigning breaches of the contract, and common counts for use and occupation of the same land, and for money had and received and money due on account stated. Defendant pleaded the general issue. A trial was had by the court and a jury at the January term, 1875, resulting in a verdict in favor of the plaintiff for $1259.17, on which the court rendered a judgment, after overruling a motion for a new trial, and the defendant appeals to this court.

The contract of leasing provided, that appellant should break the quarter section of land, and seed with timothy and clover the low, wet ground not suitable for cultivation, grow an osage orange hedge around the entire quarter, and have it made by the expiration of the lease, which was to run for seven years, a sufficient fence to turn stock, and where hedge would not grow to advantage, on account of the ground being wet, he was to have a new fence made, of burr or white oak posts and pine boards, five boards high, to be done in a workmanlike manner; and also a good and sufficient gate, five planks high, on the east line, near the north-east corner. It is claimed that appellant failed to make the hedge, and that he did not leave such a fence and gate on the farm as he had agreed and contracted he would.

By this lease appellant was to pay rent by the improvements he therein agreed to make, and having failed to perform his contract he is liable to pay all the immediate and direct damages that flow from the breach. Then, what are these damages? First, all that it would reasonably cost to construct such a fence and hedge as appellant agreed to leave on the farm; next, the difference in the value of the use of the

land, or in its rental value, until such a hedge could be grown on the ground suitable for such purpose, and the construction of the fence where a hedge could not be properly grown; the difference in the rents between the land as he left it until a fence could be placed there, and its rental value after the fence should be made, and after the construction of the fence the difference until the hedge could be grown; and in addition thereto, the reasonable cost of planting and cultivating a hedge until it should answer the purposes of its construction, and the price of building such a fence and gate as is required by the agreement, on such portions of the land as are specified by the lease.

Appellee had the right to recover the fair and reasonable price for breaking any portion of the land that could have been but was not broken, and what would be a reasonable rent therefor until it could be broken; also the cost of seeding any portion which the contract required to be seeded and was not, with a reasonable rent therefor until it could be seeded in grass. But we perceive no other elements for a recovery.

Appellant entered and occupied under the lease, and was, for the rent, required to make the improvements he had agreed, and, failing to do so, appellee could only exact the damage sustained thereby. A mere breach of the contract did not, of itself, work a forfeiture, and convert the tenant into a tenant liable to pay for use and occupation. Until steps should be taken to terminate such a lease, the lessee must be held to occupy under the lease. No such steps were taken in this case. The court below therefore erred in receiving evidence to prove the difference in the rental value of the farm as it was and as it would have been had the improvements been made, for the purpose of charging appellant with that difference whilst he held under the lease. And the court further erred in refusing to exclude that evidence on the motion of appellant—and this was such an error as may have worked material injury to appellant. The evidence is not so clear

and satisfactory that we can say the finding would have been for the same amount, and no less, had the evidence been excluded.

The judgment will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Judgment reversed.

JOHN CULVER

v.

THE HIDE AND LEATHER BANK OF CHICAGO.

1. PRACTICE—*giving time to plead.* The giving of time to plead is a matter of discretion with the court, and a refusal to give such leave is not subject to review in this court, where no abuse of discretion appears.

2. ASSIGNEE *before maturity—subject to what defenses.* Facts showing a failure of consideration or fraud in the consideration of a promissory note, but not showing fraud or circumvention in obtaining its execution, will be no defense against the note in the hands of an assignee taking the same before maturity without notice.

3. ASSESSMENT OF DAMAGES—*presumption as to proofs.* In the absence of a bill of exceptions showing the evidence heard upon the assessment of damages in case of a default, it will be presumed that it was competent and sufficient.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. CHARLES J. BEATTIE, and Mr. MORTON CULVER, for the appellant.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was an action upon a promissory note for the sum of $889.60, bearing date December 1, 1874, payable to the order of A. T. Ewing, on or before January 1, 1875, executed by appellant and indorsed by Ewing to appellee, The Hide and Leather Bank.

It appears, by the record, that, on the fourth day of the term, the defendant appeared and entered a motion to dismiss the suit, which the court overruled; and thereupon, for want of a plea, the default of the defendant was entered, the plaintiff's damages assessed by the court, and judgment rendered against the defendant for $894.50.

On the thirteenth day of the term, a motion was made by the defendant, supported by affidavits, to vacate the judgment and set aside the default, which motion was denied.

It is assigned for error that the court refused to allow the defendant a reasonable time to plead.

The record does not show that any time was asked or refused. The defendant was summoned to appear and answer on the first day of the term.

No error appears in taking his default on the fourth day of the term; and had time been asked to plead, its allowance or not would have been discretionary with the court, not to be reviewed where no abuse of the discretion appears.

There is a further claim of error, in the denial of the motion to vacate the judgment and set aside the default. The affidavit presented upon the hearing of the motion did not show a defense to the note as against the plaintiff, the assignee thereof. It is supposed by appellant that the facts make out a case of fraud and circumvention in obtaining the making of the note, which, under the statute, is made a defense against the assignee. But the facts shown make out no such case; they make out no more than a failure of consideration, or, at the most, fraud in the consideration, which is quite different from the use of fraud or circumvention in obtaining the making or executing of the note.

Appellant claims it is shown that appellee is not an innocent assignee of the note, because, in a written notice sent by the bank to appellant, of the note being there, it is mentioned as being there for collection, and, on application at the bank, the cashier informed appellant that the bank held the note

as collateral. The affidavit of the cashier makes the explanation that, on this application by appellant, the cashier did tell him that he thought the note was there for collection, but that he went immediately and examined the books, and thereupon informed appellant that the note had been discounted by the bank; and there is an affidavit that it was regularly discounted at the bank on the 16th day of December, 1874. The court properly overruled the motion, no defense being shown as against the bank.

There is nothing in the point made that the court, in assessing damages, took the affidavit of the plaintiff's claim filed with the declaration as *prima facie* evidence of the amount due, without the production of the note sued on. It is supposed by appellant's counsel that this must have been so, because, in the clerk's transcript of the record and papers on file, no copy of the note appears. This might be so, and yet the note have been produced upon the assessment of damages, and not have been left upon file. There is no bill of exceptions showing what evidence was introduced upon the assessment of damages. The judgment entry recites that the damages were assessed upon hearing proofs. It will be presumed they were competent and sufficient.

The judgment is affirmed.

Judgment affirmed.

JACOB FRYE *et al.*

v.

DANIEL A. JONES *et al.*

1. CONFESSION OF JUDGMENT UNDER WARRANT OF ATTORNEY. **The authority to confess a judgment without process must be clear and explicit, and must be strictly pursued.**

2. A warrant of attorney, which authorizes the confession of judgment upon a note therein described, and also upon other indebtedness to be afterwards incurred by the maker of such note to the payee thereof, upon other notes made or to be made, will not authorize the confession of a judgment upon other notes payable to the same payee, and bearing the same date of the note particularly described in such warrant of attorney.

3. In this case, there were thirteen notes, all of the same date, executed by the defendant and payable to the plaintiff, to six of which were annexed warrants of attorney, each authorizing a confession of judgment for the amount of the note to which it was annexed, and also for any further indebtedness of the defendant which might thereafter accrue to the defendant upon any note, bond, etc., made or to be made. The attorney named in the six warrants of attorney, confessed a judgment for the amount of all the thirteen notes: *Held*, that it was error to refuse to set aside so much of said judgment as included the amount due upon the notes to which no warrant of attorney was attached.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. HARDING, MCCOY & PRATT, for the plaintiffs in error.

Messrs. HUTCHINSON & LUFF, for the defendants in error.

Mr. JUSTICE SHELDON delivered the opinion of the Court:

This was a motion, on the part of defendants, to set aside a judgment, rendered against them by confession.

The judgment was rendered in the Superior Court of Cook county, on the 31st day of March, 1875, against Frye and Reed, for $12,774.49, and in favor of Jones and Raymond, upon thirteen promissory notes, each for the sum of $750, with eight per cent interest per annum, dated May 12, 1871, and payable to Jones & Raymond, one on the first day of each succeeding month, commencing July 1, 1872, and ending July 1, 1873.

The judgment was taken by confession, under a warrant or warrants of attorney, attached to only six of the notes, or to every alternate note, viz: to the notes due, respectively, on

the first days of August, October, and December, 1872, and February, April, and June, 1873. The remaining seven notes, viz: the notes due, respectively, on the first days of July, September, and November, 1872, and January, March, May, and July, 1873, precisely similar in form to the said six notes, had no warrant of attorney attached to them. The notes themselves were in the usual form, being printed blanks, filled up, with printed blank warrants of attorney following, each on the same page; but the seven notes due each alternate month, commencing July 1, 1872, appear to have had the warrant of attorney torn off from each, while the remaining six had the blanks in the warrants filled up, and were signed by Frye and Reed.

The warrants of attorney attached to the six notes, are in the following form, varying only as to the respective times of payment of the notes:

"Know all men by these presents, that whereas we, the subscribers, are now justly indebted to Jones & Raymond, upon a certain promissory note, bearing even date herewith, for the sum of $750.00, made payable to the order of the said Jones & Raymond, and due June 1, 1873, and may, from time to time, hereafter, become further or otherwise justly indebted to the said Jones & Raymond, upon bonds, promissory notes, due bills, and other written evidences of debt, made or to be made, endorsed or accepted by us, and held or owned by the said Jones & Raymond, assignee or assignees hereof,

"Now, therefore, in consideration of the premises, and of the sum of one dollar to us paid by the said Jones & Raymond, the receipt whereof is hereby acknowledged, we do hereby make, constitute and appoint O. K. A. Hutchinson, or any attorney of any court of record, to be our true and lawful attorney, irrevocably, for us, and in our names, places and stead, to appear in and before any court of record, either in term time or in vacation, in any of the States or Territories of the United States, at any time after the ———— of said note, or of any such bond, promissory note, due bill, or other

written evidence of debt so already made or to be made, endorsed or accepted by us, as aforesaid, respectively, to waive service of process, and confess a judgment in favor of the said Jones & Raymond, executors, administrators, assigns or assignees, or the legal holder or holders of said note, or of any one or more of such bonds, promissory notes, due bills, or other written evidences of debt, as aforesaid, for so much money as shall, by the same, appear to be due or owing thereon, with interest thereon according to the tenor and effect thereof, respectively, together with costs. (Then follow other provisions not material to the question here raised.)

"Witness our hands and seals, this 12th day of May, A. D. 1871.

"JACOB FRYE, [seal.]
"DANIEL J. REED." [seal.]

The question is, whether these warrants of attorney gave authority to confess judgment upon the seven notes to which no warrants of attorney were attached.

We are of opinion they did not. The warrants recite that the subscribers *are now justly indebted* to Jones & Raymond upon the promissory note particularly described, and *may, from time to time hereafter, become further indebted* to the said Jones & Raymond upon bonds, etc. The authority given is, to confess judgment upon such indebtedness, which is the present indebtedness on the note described, and such future indebtedness as might thereafter accrue in favor of Jones & Raymond. The only *present* indebtedness to Jones & Raymond, embraced within the scope of the authority, we consider, is that upon the note particularly described.

These seven notes were present, and not future, indebtedness. They were all of the same date with the warrants of attorney, and upon them the makers were then indebted—they were not notes upon which they might thereafter become indebted to Jones & Raymond. They were of the same date with the six notes to which the warrants of attorney were attached, and the language in the warrants of attorney as to the described

notes in them, that the makers "are now justly indebted" to Jones & Raymond upon them, was just as applicable to the seven notes as to any one of the six.

The only room for doubt arises from the language in the recital, as to the future indebtedness that might arise to Jones & Raymond, in describing it as upon bonds, etc., "*made* or to be made," and in authorizing the confession upon any such bond, promissory note, etc., "so *already made* or to be made." But this language might have operation without embracing these seven notes, or any other present indebtedness to Jones & Raymond. The power was not, to confess judgment generally upon any notes which had then been made to Jones & Raymond, but, taken in connection with the recital, it was, to confess judgment upon such notes already made, as Frye & Reed might *thereafter become indebted* to Jones & Raymond upon. Frye & Reed might have had outstanding notes at the time, which had been made to other persons, upon which they were not then indebted to Jones & Raymond, but might afterwards become indebted to them thereupon, by Jones & Raymond's subsequent acquirement of such notes by purchase, and the transfer thereof to them. In this way may these words be satisfied, without including these seven notes.

There can be no doubt, we think, that the parties never intended to include the seven notes in the warrants of attorney.

It appears that Frye & Reed, then, owed Jones & Raymond a debt of $9,750, which was divided into thirteen monthly payments, of $750 each, for which they gave to Jones & Raymond their thirteen promissory notes, all dated May 12, 1871. The note first due, July 1, 1872, had no warrant of attorney attached, but the one due the first of the next following month had a warrant of attorney attached to it, and this was repeated through the whole series as to every alternate note.

It appears, that all the notes were precisely similar in form, and written upon like blanks, and that each alternate note had the warrant detached.

The six notes appear to be printed blanks, filled up, with printed blank warrants of attorney following, on the same page. The same appears with respect to these seven notes, except that the printed blank warrants of attorney are detached.

All this particularity denotes, unmistakably, the intention of the parties, that, as to the six notes having warrants of attorney attached, there should be given a warrant of attorney to confess judgment upon them; but that, as to these seven notes, to which no warrant of attorney was attached, there should not be and was not given any warrant of attorney to confess judgment upon them.

The authority to confess a judgment without process, must be clear and explicit, and must be strictly pursued. *The Man. and Mech. Bank, etc.* v. *St. John*, 5 Hill, 497; *Chase* v. *Dana*, 44 Ill. 262.

As to these seven notes, we are satisfied there had been no power given to confess a judgment upon them, by any of these warrants of attorney attached to the six notes.

It is urged, that this is an appeal to the equitable jurisdiction of the court, and that, as reasons for refusing its exercise, an appeal was prayed and allowed from the order of refusal to set aside the judgment; that the appeal was not perfected by filing an appeal bond; that, after the expiration of the time for doing so, real estate in a foreign county was sold under the judgment, for nearly sufficient to satisfy it, and bid in by the defendants in error; that after such sale, this writ of error was sued out; and that, further, there is no meritorious defense shown to the notes.

The proof being clear, that, as to these seven notes, the attorney who confessed the judgment acted without the authority of the parties represented, the judgment, as respects these notes, was unauthorized and wrongful, for want of any power to enter the appearance of the makers of the notes and confess the judgment; and this, alone, was reason sufficient for setting aside the judgment to the extent of those notes.

The order of the court below, then, overruling the motion to set aside the judgment, is reversed, as to so much of the judgment as has included in it the amount due upon the said seven notes, or any of them, to which no warrant of attorney was attached, and in all other respects the order is affirmed, and the cause is remanded for further proceedings, in conformity with this opinion.

Judgment reversed in part.

JONAS BERGER *et al.*

v.

JONAS PETERSON.

1. EVIDENCE—*in chancery, confined to case presented by the pleadings.* On bill to foreclose a mortgage given to secure a written agreement to repay a certain sum of money in case the same is not realized by the sales of a patent, etc., it will not be proper to go back of the mortgage and agreement to establish a debt upon which to base a decree of foreclosure, in the absence of allegations in the bill justifying the same.

2. CONTRACT—*construed.* Where a written agreement recites a sale and conveyance of an interest in a patent right for $1000 paid at the time, and provides that, if the vendee shall fail to realize that sum, within three years, from sales, the vendor will pay him back the price upon a reconveyance, and is silent as to what efforts shall be made to effect sales, the law will require a reasonable effort on the part of the vendee to make sales, taking into consideration his ability and pecuniary means to engage in the enterprise.

3. And where the sale was of a fourth interest in a patent relating to an invention in the making of organs, and the assignee was a foreigner, and unacquainted with our language, and nearly all his means were invested in the purchase: *Held*, that it could not have been the intention of the parties that the assignee should enter upon the manufacture of musical instruments under the patent.

4. If an inventor conveys a fourth interest in his patent to another for $1000 cash, and agrees, in writing, to repay the same in three years if that sum can not be realized from sales, upon a reconveyance, and it is shown that he prevented sales from being made, and that the grantee used reasonable exertions to realize his money from sales, according to his ability and

means, but without success, the grantor will be liable to repay the price paid, with six per cent interest after the end of the three years and the tender of a reconveyance to him, and the fact that the grantee had, prior to his tender, refused to reconvey, will not change the result.

5. OFFER TO PAY—*when no defense.* Where a contract does not provide for any forfeiture, a mere offer to pay an indebtedness created under it, and a refusal to accept, will not preclude the party from afterward enforcing payment.

6. The proof of a mere offer to pay money under a contract, without showing an ability to make the payment, can not be regarded as of any force in a suit for the money due.

WRIT OF ERROR to the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. F. S. MURPHY, and Mr. HOMER GAINES, for the plaintiffs in error.

Mr. JONAS W. OLSON, for the defendant in error.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill in equity, brought by Jonas Peterson, in the circuit court of Knox county, against Jonas Berger and Guermina Berger, his wife, to foreclose a mortgage on certain real estate, executed to secure the payment of $1000, for which Berger had given Peterson an instrument of writing, which read as follows:

"WHEREAS, I, Jonas Berger, have, by my deed, bearing date the 6th day of May, 1868, sold and conveyed to Jonas Peterson one-fourth interest in my patent for improvements in melodeons and improvements in key-coupling musical instruments, and for which the said Jonas Peterson has paid me the sum of one thousand dollars: I now hereby agree that, in case the said Jonas Peterson shall fail to realize the said sum of one thousand dollars from the sales of said patent or instruments, made in pursuance of the same, within three years from this date, then, and in that case, I promise and agree to pay to him, the said Jonas Peterson, said sum of one thousand

dollars, upon his reconveying to me said interest so conveyed to him as aforesaid.

"Witness my hand, this 5th day of August, 1868.

"JONAS BERGER."

Prior to the filing of the bill, and in May, 1874, Peterson tendered Berger a reconveyance of the patent, and demanded the payment of the $1000. Berger refused to receive the deed, and declined to pay the money.

Upon the hearing, the court found there was due the complainant $1000, and interest thereon, at the rate of six per cent, from the 24th day of May, 1872, the time the deed was tendered, to the time of the rendition of the decree, June 25, 1875, making the sum of $1185, and rendered a decree directing a sale of the mortgaged premises, upon default of payment within a day named in the decree, to reverse which the defendant brings this writ of error.

It is clear, from the testimony, that Berger received of Peterson $1000.

It is insisted, on the one hand, that the money was loaned, and that the conveyance of the interest in the patent and the mortgage were given to secure the payment of the money. On the other hand, it is claimed that the transaction was an absolute sale, by Berger to Peterson, of a fourth interest in the patent, for $1000.

In the view we take of the case, it is not necessary to determine which of the two theories is the correct one.

The bill is brought to foreclose a mortgage given to secure the payment of the instrument of writing, *supra*, and, under the allegations of the bill, it would be improper, even if it was necessary, to go back of the mortgage and the instrument it was given to secure, to establish a debt upon which to base a decree of foreclosure.

By the terms of the instrument of writing set out in the bill, Berger agreed, in case Peterson failed to realize $1000, within three years, from the sales of the patent, or instru-

ments made in pursuance of the patent, he was to repay the $1000.

It is a fact, not in dispute, that Peterson never realized a single dollar from sales of the patent, or the instruments made under it.

It is, however, said Peterson failed to establish, from the evidence, a proper effort on his part to sell patent rights and instruments.

It will be observed that the instrument of writing is silent in regard to what effort shall be used by Peterson in order to realize from sales. The parties, by the contract, did not stipulate for any definite amount or particular kind of effort to be put forth by Peterson, or in what particular field of labor his exertions should be used.

Under such circumstances, the law would, no doubt, require a reasonable effort on the part of Peterson to realize from sales, at the same time taking into consideration his ability and his pecuniary means to engage in the enterprise.

The evidence shows that Peterson was born in Sweden, unacquainted with our language and not a business man. He was merely a day laborer. His capital was confined mainly to the money Berger had obtained.

That it was not the intention of either of the contracting parties that Peterson should enter upon the manufacture of musical instruments under the patent, is apparent from the fact that he was unacquainted with business of that character, and, besides, had no capital to invest in such an enterprise.

In regard to realizing from the sales of the patent, Peterson was, to a great extent, under the control of Berger. The deed made to him contained a provision that Peterson should never sell or dispose of the interest conveyed to him, without the written consent of Berger.

Peterson could spend his time and money in finding purchasers for the patent, but no sale could be consummated without the consent of Berger. Under this restriction, Ber-

ger had the undoubted power to prevent Peterson from realizing a single dollar from the sale of the patent.

That this power of Berger was exercised to prevent sales, is shown by the testimony of Olson, who was appointed an agent to make sales of territory. He says that Berger refused to sell for less than $50,000, and also refused to turn over the original patent. On this account, Olson, who was appointed by Peterson to sell the patent, did not sell or attempt to sell.

In addition to this, Peterson testified, in substance, that he purchased an instrument made under the patent, and tried to sell the patent right and instrument, but could not; that he spent both money and time, but could realize nothing.

It also appears, from other evidence, that Peterson was in Iowa and Nebraska, but the fruits of his labor were unavailing.

Under all the circumstances, the evidence of Peterson was sufficient to show a reasonable effort on his part to realize under the conditions of the contract. At all events, it was sufficient to shift the burden of proof upon the defendant, and require him to establish, by competent proof, that, by a reasonable effort on the part of Peterson, the money could have been realized. This, however, was not attempted.

It does not appear that Berger himself realized a dollar from the sale of the patent, or any considerable sum from the sale of instruments, since the mortgage was given. This tends to show that the patent was worthless, and that it was not through the fault of Peterson that he failed to realize the money named in the contract by a proper exertion.

It is, however, claimed by counsel of the defendant that, upon the expiration of the three years named in the instrument of writing, Berger offered to repay the $1000, and demanded a reconveyance, and Peterson refused to accept the money, and reconvey, and that the refusal of Peterson should now conclude him from enforcing the contract.

If Peterson failed to realize within the three years, then, under the contract, the defendant was indebted to him in the

sum of $1000. An offer of payment could not deprive Peterson of the right to enforce payment. The contract did not provide for a forfeiture.

But, independent of this, Berger did not offer the money. The money was not tendered, nor does it appear that he had the money ready to pay, in case Peterson was willing to accept it. A mere offer to pay money, unless the party making the offer has the ability to pay, can not be regarded as of any force.

It is said the decree is too large; that the court allowed too much interest. Upon an inspection of the decree, this position can not be sustained.

A reconveyance was tendered, and the money demanded, in May, 1872. The decree was rendered on June 25, 1875. The court allowed interest on the $1000, at the rate of six per cent, from the 24th of May, 1872, three years and one month, which was correct.

The position that the note and mortgage are without consideration, is not sustained by the evidence.

Upon a careful examination of the whole record, we are satisfied the decree of the circuit court is correct, and it will be affirmed.

Decree affirmed.

EDWARD ROBY

v.

FRANKLIN D. COSSITT, *et al.*

1. PLEADING—*what a demurrer admits.* A demurrer to a bill in equity only admits that which is well stated or pleaded, but it can not supply defects in substance, or aid that which is defectively set forth.

2. SAME—*rule for construing.* The rule of law is, that the allegations in a bill or other pleading shall be construed most strongly against the pleader.

Syllabus.

3. SPECIFIC PERFORMANCE—*of contract made by an agent.* A bill for the specific performance of a contract of sale made by an agent, which fails to show that the person executing the same was the agent of the owner, duly authorized, either by any charge, or by the contract so far as it is set out, is bad on demurrer.

4. SAME—*bill must be filed in reasonable time, and show a readiness to perform.* Where a contract was made for the sale of land in February, 1867, for the sum of $52,000, one-third of which was to be paid in hand, and the balance in two equal annual installments, with interest, and the purchaser paid only $500 down, and did not offer to make the several payments when due, and did not file his bill for specific performance until in July, 1873, when the property had greatly risen in value: *Held*, in the absence of any excuse being shown, that the delay in offering to perform, and in filing his bill, were such that equity could not aid him.

5. If a vendee desires to insist upon the performance of a contract of sale, he should tender the purchase money as the same falls due, and show a readiness and willingness to perform on his part, and if the vendor refuses to comply, file his bill at once. He will not be allowed to lie still to speculate upon the chance of a rise in the property.

6. SAME—*unexplained delay in performing.* All contracts with reference to the sale of land, where time is not of the essence of the contract, must be performed or rescinded within a reasonable time, and if there has been any unusual delay that can not be explained consistently with good faith, equity will hesitate to enforce a specific performance.

7. SAME—*excuse for not performing.* The fact that a third party informed the purchaser of land that the owner desired to have the execution of the contract postponed until he could settle with other parties claiming to have contracts for the same property, does not relieve the vendee from the duty to tender performance of the contract, if he intends to insist upon its enforcement.

8. AGENCY—*whether a promise to perform is a ratification.* If one professing to act as the agent of A, makes a contract for the sale of land, an expression of willingness by A, the owner, to carry out its terms, can not be held a ratification of the contract. It is a mere promise to sell upon the same terms, and is not enforceable under the Statute of Frauds, unless reduced to writing and signed by the owner or some one by him lawfully authorized.

9. But if a person makes a written contract for the sale of land as the agent of the owner, although without authority, the owner may adopt it and make it his own, and the ratification will relate back to the act done.

10. PARTIES IN CHANCERY—*specific performance.* If A, as the agent of B, contracts to sell land belonging to C, where it is claimed that C after-

ward adopted the sale, B and the heirs of A, the agent, are improper parties to a bill to enforce specific performance against C, and if made parties, the bill will be bad on demurrer for that reason.

WRIT OF ERROR to the Superior Court of Cook county; the Hon. SAMUEL M. MOORE, Judge, presiding.

This was a bill in chancery, by Edward Roby against Franklin D. Cossitt and others, for the specific execution of a contract for the sale of lands made to one Elisha Nason, and by him assigned to the complainant. The opinion of the court contains a substantial statement of the material facts of the case. The court below sustained a demurrer to the bill and dismissed the same.

Mr. EDWARD ROBY, *pro se.*

Messrs. LYMAN & JACKSON, for the appellees.

Mr. CHIEF JUSTICE SCOTT delivered the opinion of the Court:

Without reference to the question whether the construction complainant contends should be given to the Statute of Frauds, can be maintained, we think the bill was properly dismissed for the special causes set forth in the demurrer. The allegations of the bill are too indefinite and uncertain to warrant the relief sought under it.

The bill is for the specific performance of an alleged contract in relation to the sale of real estate. Upon information and belief, it is charged defendant Cossitt was the owner of the land involved in this litigation. It is also alleged complainant was informed one Whipple, who is also made a defendant, "claimed to have some interest in or title to said land, and represented to one Curtis C. Meserve, a land agent and broker in lands, that he was part owner in said property," but it is added he was unable to obtain information sufficient to form a belief whether Whipple was, in fact, interested in

the lands or the profits that might be obtained on the sale thereof, but that he was not vested with the legal title.

There is no pretense there was any memorandum in writing in relation to the sale of the land signed by Cossitt himself, but it is charged the contract was made by C. C. Meserve, since deceased, but whose widow and heirs are made defendants, and that the receipt or memorandum in relation thereto was signed by Meserve, as agent for the owner, and was "also signed by Whipple, or in his name, or under his authority."

The argument is, the facts alleged in the bill being admitted by demurrer, they establish in complainant a right to have the contract specifically performed in his favor. The general rule, however, is, the demurrer only admits that which is well stated or pleaded, but it can not supply defects in substance, or aid that which is defectively set forth. Nowhere in this bill can be found any clear, distinct and affirmative charge that Meserve was the agent of Cossitt for the sale of this land. So far as the contract is set out, it does not disclose that it was on his account the land was sold. Indeed, all the charges as to the ownership of the land, and the agency of Meserve, are vague and indistinct. Construing the allegations of the bill most strongly against the pleader, as the rule of law requires us to do, we may well understand it to be charged that Meserve was acting on behalf of Whipple in making the alleged contract. The contract, it is charged, was "signed by said Whipple, or in his name, or under his authority." It was Whipple who represented to Meserve he was part owner of the property. When it is charged that Meserve signed the contract on behalf of the owner, we may, with as much propriety, understand it was for Whipple as that it was for Cossitt.

Adopting the view, which we think we are warranted in doing, that, when Meserve was acting for the owner, and made a contract in relation to the sale of the property, he was the agent of Whipple, then there was no memorandum or note thereof in writing in relation to the sale of the lands

signed by Cossitt, or some other person thereunto by him lawfully authorized. This was indispensable to bind Cossitt.

Complainant's case is not at all aided by the fact, as charged, that Cossitt said, after the contract had been made, that he would convey the property to Nason, in pursuance thereof. The utmost that can be said of this promise is, that it was an agreement to sell the land to Nason on the same terms and upon the same conditions that Meserve had agreed to sell it to him when acting as the agent of Whipple. Still it was but a verbal agreement on the part of Cossitt, and no memorandum or note thereof in writing was signed by him or by any authorized agent. It was a mere verbal promise to sell his real property, and is not enforceable under the Statute of Frauds. Because Meserve may have made a contract on behalf of Whipple, who claimed to be a part owner, in relation to the sale of the lands, it does not follow that, because Cossitt may have expressed a willingness to sell his land upon the same terms, the contract made by Meserve was his contract, or made on his behalf. It is nowhere alleged the promise of Cossitt to comply with the contract made by Meserve in relation to the land was in writing, or that any memorandum or note thereof was signed by him, or by some other person thereunto lawfully authorized, and without it the promise was within the Statute of Frauds.

Had Meserve, in the first instance, assumed to act as the agent of Cossitt, although without authority, and made a contract on his behalf for the sale of the property, we entertain no doubt he could have adopted it and made it his own. The ratification would have related back to the act done. But that is not the case made by this bill. As we have before stated, it is not distinctly charged that Meserve acted as the agent of Cossitt in making the contract he did in relation to the property, and we will not infer that he did. The affidavit of Meserve, made a part of the bill, if it can be considered on the demurrer, discloses most clearly that he made

the contract on behalf of Whipple under the belief he was the owner, and that it was not until some time afterward that parties told him that Cossitt was the owner of the property, and not Whipple, and that Cossitt wanted to see him about it.

But there is another view that is equally conclusive of the case. The alleged contract was made February 15, 1867, and this bill was not filed until July 14, 1873. The contract price was $52,000, one-third to be paid within forty days, and the balance in three equal annual payments, with eight per cent interest. Only $500 were paid to Meserve at the date of the contract.

Each installment of the purchase money had become due before this bill was filed. It is not claimed the vendee, or any one for him, paid any but the first installment of the purchase money. It is charged that $52,000 was a fair price for the property at the time of making the contract, but that it had since risen to be of the value of $240,000 when this suit was commenced.

No sufficient excuse is shown for the unusual delay in attempting to enforce a specific performance of the contract. The vendee has slept upon his rights, whatever they may have been, until equity will not interfere in his behalf. Had he intended to insist upon a performance of the agreement, he ought to have filed his bill within a reasonable time, and tendered the purchase money as the several installments matured. This he has not done. In fact, he has done nothing to show readiness and willingness to perform the contract on his part, nor that he had the ability to perform it. But a trifling sum was ever paid to the alleged agent, but complainant asks to obtain the advantage of the immense rise in the value of the property, without having himself performed or offered to perform the contract except in an unimportant part. Had he supposed he had a valid contract with the owner of the property, he ought to have tendered performance, and, if the owner refused to comply on his part, filed his bill at once.

After the property has quadrupled in value, equity will not permit him to come forward and have the value of the contract he has not himself offered, within any reasonable time, to perform.

All contracts with reference to the sale of land, where time is not of the essence of the contract, must be performed or rescinded within a reasonable time, and if there has been any unusual delay that can not be explained consistently with good faith, equity will hesitate to enforce a specific performance. What Meserve may have said about Cossitt desiring to have the execution of the agreement postponed until he could settle with other parties that claimed to have contracts for the same property, is not of the slightest consequence, and did not relieve the vendee from the duty to tender performance of the contract, if he intended to insist upon it.

Under no view that we have been able to take, is complainant entitled to a specific performance of the alleged contract against Cossitt. It is not now claimed that Whipple has any interest in the land itself, and no relief can be had against him under this bill. If complainant has any claim for compensation against the estate of Meserve for having made the contract without authority from the owner of the property, his remedy is by an action at law. Neither the heirs of Meserve nor Whipple were necessary parties to this bill, and it was bad on demurrer for that reason.

The decree dismissing the bill was proper, and will be affirmed.

Decree affirmed.

STEPHEN VAN DUSEN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. PERJURY—*evidence of where affidavit was made.* On the trial of one for perjury in making an affidavit, if the State and county are given in the venue of the affidavit, this is ample evidence, in the absence of contrary proof, to show that the oath was administered in the county named in the venue.

2. SAME—*officer administering oath must do so in his district where he has power to act.* On a charge of perjury in making an affidavit, the oath being administered by a township assessor to a party being assessed by him, if the proof fails to show that the affidavit was sworn to in the assessor's township, where he alone has power to act, no conviction can be had.

3. The officer who administers an oath must have legal and competent authority, or the person taking the oath before him, however false it may be, can not be convicted of perjury.

4. OFFICER—*power to act officially out of his district.** Unless authorized by statute, an officer can perform no official act outside of and beyond the territorial limits in which he is authorized and required to act. An assessor not being authorized to assess property out of his township, can not, lawfully, administer an oath to a person, except in his township, in relation to his rights and credits liable to assessment.

WRIT OF ERROR to the Circuit Court of Whiteside county; the Hon. WILLIAM W. HEATON, Judge, presiding.

Mr. W. E. LEFFINGWELL, and Mr. JAMES SHAW, for the plaintiff in error.

Mr. JAMES K. EDSALL, Attorney General, for the People.

Mr. JUSTICE WALKER delivered the opinion of the Court:

This was an indictment for perjury, found by the grand jury of Carroll county, against plaintiff in error, at the September term, 1873, of the circuit court thereof. The affida-

* See *Durfee* v. *Grinnell et al.* 69 Ill. 371, as to what acts a justice of the peace may perform out of his township or precinct.

vit alleged to be false was sworn to before Samuel Lichty, assessor of Wysox township. The indictment contains two counts. The first charges, that on the 1st of May, 1873, there was owing to plaintiff in error, for money loaned, the sum of $10,811. The second charges, that there was owing him the sum of $6811, specifying the persons and amounts each person owed him on the day named, and it charges that he swore that there was owing him on that day but $1000 for money loaned.

A change of venue was had to Whiteside county, and at the August term, 1874, plaintiff in error was tried, and the jury found him guilty, and fixed the time he should serve in the penitentiary at three years. He, thereupon, prosecuted this writ of error, and asks a reversal of the judgment.

It is urged that there is no evidence tending to prove the oath was administered in the county of Carroll. Counsel misconceive the force and effect of the venue in the caption of the affidavit. It is, "State of Illinois, Carroll county," which clearly manifests the place where the oath was administered. In all affidavits and other papers requiring such a venue, it is for the very purpose of indicating the place where the act was done. Finding such a venue in the caption of the affidavit, in this case, the proof, until overcome by competent evidence, is ample of the fact that the oath was administered in Carroll county. There is no force in this objection.

It is further objected, that there is nothing to show the assessor acted in the territorial limits of his township, and in the absence of such proof, the conviction was wrong, and the judgment should be reversed. The doctrine will be conceded by all, that, unless authorized by the statute, an officer can perform no official act outside of and beyond the territorial limits in which he is authorized and required to act. The clerk of a court in one county has no power to issue a writ or perform any other official act in another county. So of a sheriff in serving process, unless expressly authorized. *Jackson* v. *Humphrey*, 1 Johns. R. 498. This rule seems to be elemen-

tary. It is true that the General Assembly may enlarge the power, or courts, under the statute, may confer the power by commission, to take depositions in a foreign government or State; but, until thus empowered, the act is extra-territorial, and is not valid or binding. In this case, the assessor was authorized, in the discharge of his duty, to administer the oath to accused as a tax-payer. He is, by the 26th section of the Revenue Law, authorized to administer oaths to persons listing property for taxation, whenever he believes the latter have failed to make a fair list of their property.

But that section, or any other, so far as we have been able to find, has not authorized him to administer an oath out of his township. He is elected in it, by the voters thereof, to assess the property therein, and the law contemplates that he will act officially within its territorial limits. The law has imposed no official duty to be performed beyond the territory of his township. His assessment of property outside of his township and in another, would strike any one as being *ultra vires* and void, and, for the same reason, an oath administered by him extra-territorially, is equally void. And it is because he is authorized to perform official acts within his township, and is not empowered to do so beyond its limits. It will be denied by none, that the officer who administers an oath must have legal and competent authority, or the person taking it before him, however false, can not be convicted of perjury.

In this case, there is not the slightest evidence to show the affidavit was sworn to in the township. It was indispensable that this fact should appear from the venue in the caption, or otherwise. There being no such evidence, the court below erred in not setting aside the verdict, and granting the accused a new trial.

The evidence as to the falsity of the oath is loose, uncertain, and to say the least, slight, upon which to convict. We are not prepared to say that we could affirm on the evidence in the record. The loan of money a number of years, or even a shorter period, before the time accused took the oath,

is too loose and indefinite upon which to base a conviction. The witnesses testified that they had paid the money which they borrowed of him, to one Lane, in Morrison, or that he had sued them in the name of Van Shirley. Lane testified, that the notes were delivered to him by Van Shirley for collection, and Van Shirley swears the notes were absolutely his before the 1st of May, 1873. Lane testified, that he barely knew accused by sight, and had never spoken to him before he received the notes; that, as he made collections, he paid the money in person to Van Shirley, or had sent it to him in Iowa by draft. Van Shirley testified that accused had no interest in the notes, nor was he to pay him any thing. Nor is this evidence contradicted by any witness. The evidence of Van Shirley may show a transaction out of the usual course of business, by plaintiff in error borrowing money from him and loaning it to others, but we are unwilling to say it was so improbable as to destroy the credibility of his testimony.

All the evidence considered, we think it fails to sustain the finding, and the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

INDEX.

ABATEMENT.

PLEA MUST GIVE A BETTER WRIT, ETC.

1. A plea in abatement must give the plaintiff a better writ or declaration, the meaning of which is, that, in pleading a mistake of form in abatement of the writ or declaration, the plea must, at the same time, *correct* the mistake, so as to enable the plaintiff to avoid the same objection in framing his new writ or declaration. *Chicago and Pacific Railroad Co.* v. *Munger*, 300.

PLEA DENYING PARTNERSHIP.

2. Where parties are sued on a note, as partners, and one of them wishes to put in issue the fact of partnership, the proper practice is to plead in abatement. *Zuel* v. *Bowen*, 234.

ACCEPTOR. See BILLS OF EXCHANGE, 1, 2, 3.

ACCOMMODATION PAPER.

MAY BE TAKEN AS SECURITY. See COLLATERAL SECURITY, 3.

ACTIONS.

FOR MONEY PAID, ETC.

1. *When action will lie.* If a party, at the request of a railway company, takes up certificates of indebtedness issued by it to its laborers for work, and to procure board, and to enable boarding house keepers to obtain groceries and provisions for hands engaged in the construction of the road, with an agreement to settle with him for the same, such party will be entitled to recover of the company the amount of such advances. *Cairo and Vincennes Railroad Co.* v. *Fackney*, 116.

FOR MONEY HAD AND RECEIVED.

2. *When an action will lie therefor, and of the nature of the action.* See ASSUMPSIT, 1, 2, 3.

ACTIONS. *Continued.*

TO RECOVER INSTALLMENTS.

3. On a contract for the payment of money in installments, assumpsit will usually lie to recover each installment as it falls due, without waiting for the last to mature. *Hamlin, Hale & Co.* v. *Race*, 422.

WHERE CONTRACT IS ABANDONED BY CONSENT.

4. *Recovery may be had for services performed.* Where the plaintiff moved into the house of a party under an agreement to work such party's farm, and take care of him as long as he lived, in consideration of which, such party was to leave the plaintiff his property by will, and continued to work under this contract for about eight months, when, owing to a misunderstanding, the plaintiff left the house, but continued to work the farm, and such party, prior to his death, devised his property to another: *Held*, in a suit against the estate, to recover for the services, that the jury were warranted in finding that the contract had been abandoned by consent, and in finding for the plaintiff the value of his services. *Stockley, Admr.* v. *Goodwin*, 127.

PROCEEDING TO RECOVER A PENALTY.

5. *When a civil action.* The proceeding before a justice of the peace to recover the penalty imposed for obstructing a road, by sec. 58 of the act in relation to Roads and Bridges, Revised Statutes, 1874, is a civil action, and not a criminal action, nor a case of a criminal nature. *Town of Partridge* v. *Snyder*, 519.

ADMINISTRATION OF ESTATES.

ADMINISTRATOR AS EXECUTOR OF SOLE DISTRIBUTEE.

1. *Whether money coming to hands of an administrator, who is also executor of sole distributee, is held as executor or as administrator.* Where the administrator of an estate qualifies as executor of the will of the sole heir and distributee of his intestate, the receipt of money by him as administrator, after the debts of the intestate are paid, will be regarded as paid to himself, as executor, without any order of court for that purpose, or the giving of any refunding bond, and, therefore, after his death, the surety on his bond, as administrator, will not be liable for such money. *Weir* v. *The People, use, etc.* 192.

2. After the death of the administrator and executor, and the appointment of an administrator *de bonis non* of the estate of which he was executor, it is not in the power of the administrator *de bonis non*, by settling with the sureties on the executor's bond, to affect the rights of the surety on the bond of the same person, as administrator, and thereby change the liability that rested upon the sureties in the bond of the deceased party as executor, to the surety on his bond as administrator. Ibid. 192.

ADMINISTRATION OF ESTATES. *Continued.*

MONEY ON LIFE POLICY.

3. *Whether it is assets for the payment of debts.* If a life policy of insurance is made payable to the party's "legal representatives," the proceeds thereof will be assets in the hands of his executor or administrator, and subject to the payment of debts, the same as any other personal assets. *The People, use, etc.* v. *Phelps, Admx.* 147.

CLAIMS MUST BE PAID PRO RATA.

4. An administrator must pay all claims presented and allowed, within the time limited by law, *pro rata.* If his account shows the payment of some creditors in full, to the prejudice of others, it should not be approved. Ibid. 147.

CLAIM SECURED UPON REAL ESTATE.

5. *May be paid out of personal assets.* It is no objection to the allowance and payment of a claim against an estate that it is secured on real estate of the intestate. The personalty is the primary fund out of which all claims must be paid, and it must first be exhausted. Ibid. 147.

RIGHTS OF JUDGMENT CREDITORS.

6. *In respect to other creditors.* Where a judgment is not a lien on the land of the defendant at the time of his death, the creditor can only collect his debt in the due course of administration, and his judgment has no preference or priority over any other creditors holding ordinary demands. *Clingman et al.* v. *Hopkie*, 152.

ISSUING EXECUTION.

7. *When a judgment is a lien* upon the land of the defendant before his death, no execution can be issued thereon before the expiration of one year after the defendant's death, and not then without three months' notice to the executor or administrator, as required by statute, or without a revivor by *scire facias.* A levy and sale in violation of these requirements are void, and pass no title. Ibid. 152.

REMEDY OF HEIRS.

8. *For moneys due from administrator, after his death.* Where an administrator dies, without having paid an heir his distributive share, which had come to the hands of the administrator, the heir may proceed upon his official bond, or elect to present the sum due as a claim against his estate. *Tracey et al. Admrs.* v. *Hadden*, 30.

ADMISSIONS.

WHAT A DEMURRER ADMITS. See PLEADING, 4.

WHAT A PLEA OF TENDER ADMITS. See TENDER, 1.

AFFIDAVIT OF CLAIM. See PRACTICE, 1, 2, 3.

AFFIDAVIT OF MERITS. See PRACTICE, 4.

AGENCY.

WHAT CONSTITUTES AN AGENT.

1. The fact that a party's wife was present when he purchased goods, and selected them, with the assistance of her husband, does not make her his agent. *Trepp* v. *Barker*, 146.

WIFE AS THE AGENT OF HER HUSBAND.

2. *During separation, in furnishing necessaries for their infant children.* See PARENT AND CHILD, 3.

3. *In the purchase of goods necessary for her own use.* See HUSBAND AND WIFE, 1.

PAROL AUTHORITY TO SELL LAND.

4. *Proof thereof.* While it may be true, that parol authority may be sufficient to constitute an agency for the sale of real estate, yet if a purchaser relies upon such authority, and seeks to enforce the contract, the proof to establish the power of the agent must be clear, certain and specific. A bare preponderance of the evidence will not be sufficient. *Proudfoot* v. *Wightman*, 553.

ALIMONY. See DIVORCE AND ALIMONY, 1 to 5.

ALLEGATIONS AND PROOFS. See PLEADING AND EVIDENCE, 4, 5.

AMENDMENTS.

UPON WHAT TERMS ALLOWED.

1. Under the statute, amendments are to be allowed upon such terms as are just and reasonable, in the discretion of the court; but such terms must not be so onerous as would practically amount to a deprivation of the right secured by the statute. *Misch* v. *McAlpine et al.* 507.

2. It is error to require as part of the terms upon which an amendment may be made, that the party asking leave to amend will not ask for a continuance of the cause, when it appears that he could not submit to such terms without abandoning his defense. Ibid. 507.

3. Such terms imposed under such circumstances are unreasonable, and amount to a denial of an opportunity to make a legal defense. Ibid. 507.

AMENDMENT OF PLEADINGS.

4. *When allowable.* Under the statute, it is hardly ever too late to amend pleadings, whether before or after verdict, upon such terms as justice may seem to demand. *Thompson* v. *Sornberger*, 353.

5. A judgment in an action of forcible entry and detainer was reversed in the Supreme Court on the ground that it was not shown that the defendant was in possession of all the land described in the complaint. When the cause went back on remandment, the circuit

AMENDMENTS AMENDMENT OF PLEADINGS. *Continued.*

court permitted the plaintiff to amend the complaint so as to include only a part of the land therein described, upon the payment of two-thirds of the costs: *Held*, that such leave was properly given. *Thompson* v. *Sornberger*, 353.

SCIRE FACIAS TO REVIVE JUDGMENT.

6. *Amendment by changing name of plaintiff.* A *scire facias*, by an administrator, to revive a judgment in favor of his intestate, is irregular, if brought in the name of the deceased; but, in such a case, it is proper to allow an amendment, by substituting the name of the administrator as plaintiff. *Challenor* v. *Niles, Admr.* 78.

PETITION ON BILL TO CONTEST ELECTION.

7. *May be amended.* See ELECTIONS, 14.

AFFIDAVIT OF CLAIM.

8. *May be amended.* See PRACTICE, 3.

AMENDMENT OF APPEAL BONDS.

9. *When a sufficient bond should be allowed to be filed.* See APPEAL BONDS, 2.

CONTINUANCE.

10. *An unnecessary amendment of an account not ground of continuance.* See CONTINUANCE, 3.

APPEALS.

WHETHER AN APPEAL WILL LIE.

1. *From a judgment of a justice of the peace.* An appeal lies from a judgment of a justice of the peace in a proceeding to recover a penalty, under section 58 of the act in relation to Roads and Bridges, Revised Statutes, 1874. *Town of Partridge* v. *Snyder*, 519.

2. Such a proceeding is an action of debt or assumpsit for the recovery of a penalty, and plainly falls within the words of the general statutory provision, that appeals shall be granted in all cases contained in the act conferring jurisdiction on justices of the peace, where the action of assumpsit or debt will lie. Ibid. 519.

DAMAGES FOR DETENTION OF DOWER.

3. *Remedy by appeal instead of bill in chancery, in case court below refuses to assess widow's damages in proceeding by petition for assignment of dower.* See DOWER, 7.

APPEAL BONDS.

BY WHOM TO BE GIVEN.

1. Where an appeal is taken by the town from a judgment of a justice of the peace, in such a case the bond should be executed by the supervisor of the town, in the name of the town, and not by the commissioner of highways. *Town of Partridge* v. *Snyder*, 519.

APPEAL BONDS. *Continued.*

FILING AN AMENDED BOND.

2. Where, in a proceeding to recover a penalty for obstructing a road, an appeal was attempted to be taken from the judgment of the justice of the peace, and an appeal bond was executed by the commissioner of highways and approved by the justice of the peace, it was the duty of the court to permit the town to file a sufficient appeal bond. *Town of Partridge* v. *Snyder*, 519.

APPEARANCE.

RECITAL IN THE RECORD

1. *Can not be overcome by mere statement of the party that he did not authorize an appearance.* See EVIDENCE, 5.

UNDER POWER OF ATTORNEY.

2. *Jurisdiction of the person.* See JUDGMENTS, 6, 7.

ARBITRATION AND AWARDS.

AWARD—HOW FAR CONCLUSIVE.

1. The finding of arbitrators, like that of a court, must be regarded as embracing all matters submitted to them, and, unless impeached in some manner known to the law, is conclusive of the rights of the parties. *Hadaway* v. *Kelly*, 286.

2. The law, in the absence of proof of fraud, will presume the arbitrators considered all the evidence, and allowed such items to the respective parties as they considered proved. Ibid. 286.

ASSIGNMENT.

INDORSEMENT IN BLANK.

1. Possession of a promissory note indorsed in blank is evidence of title. *Palmer* v. *The Nassau Bank*, 380.

ASSIGNMENT BY A BANK TO ITS PRESIDENT.

2. No reason is perceived why a bank, through its agent and president, may not, by indorsement, transfer the legal title of a promissory note to such president. Ibid. 380.

ASSIGNEE BEFORE MATURITY.

3. *Subject to what defenses.* Facts showing a failure of consideration or fraud in the consideration of a promissory note, but not showing fraud or circumvention in obtaining its execution, will be no defense against the note in the hands of an assignee taking the same before maturity without notice. *Culver* v. *The Hide and Leather Bank of Chicago*, 625.

WHETHER A LIEN IS ASSIGNABLE. See LIENS, 7.

ASSUMPSIT.

FOR MONEY HAD AND RECEIVED.

1. In an action of assumpsit for money had and received, the main inquiry is, whether the defendant holds money which, in equity and good conscience, belongs to the plaintiff. *Belden* v. *Perkins*, 449.

2. It is frequently called an equitable action, and it approaches nearer to a bill in equity than any other common law action, and, indeed, has many of the advantages, without the formalities and dilatory proceedings of a chancery suit. Ibid. 449.

3. If a plaintiff delivers property to his creditor, to be sold by the creditor at his option, and the creditor sells to a third party, who converts the property into money, such plaintiff can not recover in a suit against such purchaser for money had and received. Ibid. 449.

WHEN THE ACTION WILL LIE.

4. *In favor of tenant for breach of implied covenant for possession.* See LANDLORD AND TENANT, 2.

ATTACHMENT.

SERVICE OR LEVY ESSENTIAL TO JURISDICTION.

1. In an attachment before a justice of the peace, where there is no personal service upon the defendant, or levy upon his property, and notice, as required by statute, the justice will have no jurisdiction to adjudicate and render judgment, and any judgment rendered will be a nullity. *Borders et al.* v. *Murphy*, 81.

REMEDY—WHEN WRONGFULLY SUED OUT.

2. A defendant in attachment, who has been wrongfully complained against, may defend the attachment, may sue on the attachment bond, or bring trespass. *Thomas* v. *Hinsdale et al.* 259.

3. *Waiver of the trespass by appearance.* See TRESPASS, 2.

ATTORNEY AT LAW.

REASONABLENESS OF FEE.

For a certain service. See INJUNCTIONS, 13.

AUTHENTICATION.

FOREIGN JUDGMENT.

In what manner authenticated. See JUDGMENTS, 1.

BAGGAGE. See CARRIERS, 1, 2, 3.

BAILMENT.

TO WHOM A LOAN WAS MADE.

1. Where a married woman requested of a party the loan of a horse to visit her brother, and, about a week after, her husband and

BAILMENT. To whom a loan was made. *Continued.*

son went for the same, and, not finding the owner at home, the husband sent the son, who procured the animal, which was used to make the visit, it was *held*, that the jury were warranted in finding the loan was made to the wife, notwithstanding she may not have directed her son to get the animal, or may not have known that he had gone for it when he did. *Hagebush* v. *Ragland*, 40.

Degree of care required of borrower.

2. Where an animal is borrowed without hire, the borrower is bound to use extraordinary care of the same, and for any failure of such duty, resulting in injury to the lender, the borrower will be liable. Ibid. 40.

BANKRUPTCY.

Should be pleaded.

1. It is not error to exclude a certificate of bankruptcy offered in evidence by the defendant, where the same has not been pleaded. *Horner* v. *Spelman et al.* 206.

Debts contracted by fraud.

2. *Not discharged.* A discharge in bankruptcy is no defense to a suit on a judgment, which was for the "covins, frauds, wrongs and injuries" committed by the bankrupt defendant. Ibid. 206.

BILLS OF EXCEPTIONS. See EXCEPTIONS AND BILLS OF EXCEPTIONS, 1 to 5.

BILLS OF EXCHANGE.

Acceptor.

1. *Can not plead that there was no consideration.* In a suit against the acceptor of a bill of exchange, he will not be permitted to insist that there was no consideration for the acceptance. ***Nowak* v. *Excelsior Stone Co.*** 307.

2. *Want of funds.* The fact that the acceptor of a bill of exchange had no funds in his hands belonging to the drawer at the date of the acceptance, or that he was not then and did not thereafter become indebted to the drawer in any manner, makes no difference in a suit against the acceptor, and a demurrer to a plea setting up such fact should be sustained. Ibid. 307.

3. *Rule not changed by the statute.* The 9th section of chapter 98 of Revised Statutes of 1874, being substantially like the statute of 1845, in which the word "bill" was held to mean due bill, is to be construed the same way, and held not to have any reference to bills of exchange. Ibid. 307.

BOARD OF HEALTH OF CHICAGO.

REGULATING THE BUSINESS OF SLAUGHTERING.

Upon whom the power is conferred. See CORPORATIONS, 7.

BOUNDARIES.

REFERENCE TO GOVERNMENT PLAT.

1. Where fractional pieces of land are patented, bounded, in part, by a stream, or bayou, and there is a dispute as to the boundaries, the original plat, or a copy thereof, may be resorted to, and the lines as originally run will control. *McCormick* v. *Huse*, 363.

2. Where a fractional half quarter section appears, from a government plat made from the original field notes of the survey, to have a clearly defined south line from a common corner of certain sections, 1266 links to a bayou of the Illinois river, which is navigable, and running thence northwesterly to the west line, the patentee and those claiming under him will be restricted to the boundaries as shown by the plat and field notes, and the bayou will form a part of the boundary line. Ibid. 363.

3. Where a quarter of land is made fractional by a navigable water course, a party receiving a patent for a fractional part of it on one side of the water course, where the area sold to him is noted on the plat of the fractional tract called for by his patent, and the contents calculated, his entry and purchase will not extend across the stream, so as to embrace that part of the quarter on the other side. In such a case, the party purchases by the plat. Ibid. 363.

"BURNT RECORDS ACT."

DECREE ESTABLISHING TITLE.

1. Under the statute known as the "Burnt Record Act," where a petition is filed to establish and confirm the title to land, the court is authorized to decree in favor of the better title, in case of a dispute as to the ownership. *Robinson* v. *Ferguson et al.* 538.

CARRIERS.

BAGGAGE OF PASSENGERS.

1. *Evidence that carrier received it.* The delivery of a baggage check by a railroad company to a passenger is *prima facie* evidence that the carrier has received the baggage it represents, but such evidence may be overcome by proof to the contrary, but the burden of proof is upon the carrier to show a non-delivery. *Chicago, Rock Island and Pacific Railroad Company* v. *Clayton*, 616.

2. Where a railway company received a passenger's check for baggage, which had not then arrived by another road, and gave its

CARRIERS. BAGGAGE OF PASSENGERS. *Continued.*

own check for the same, and it appeared that it surrendered the passenger's first check to the other railway company, it was *held*, that this was sufficient, in the absence of proof to the contrary, to show that the baggage was received by the company so surrendering the first check. *Chicago, Rock Island and Pacific Railroad Company* v. *Clayton*, 616.

3. *Carrier liable if it receives baggage after giving check.* It is immaterial when baggage comes to the possession of the carrier, whether at the time the check is issued, or at a subsequent time. In either case, its liability as an insurer becomes fixed in case of a loss. Ibid. 616.

CERTIORARI.

UNDER THE STATUTE.

1. *Requisites of the petition.* The facts required by the statute, to authorize a writ of *certiorari* to remove a cause from a justice of the peace to the circuit court, must be *shown* by the petition, not merely alleged as a conclusion of the party. *First National Bank of Chicago* v. *Beresford*, 391.

2. A petition for a writ of *certiorari* stated that the defendant appeared at the office of the justice of the peace two hours after the time he was required by the summons to appear, and was then informed by a clerk of the justice that no judgment had been rendered against him, and that none could be rendered after that time: *Held*, that a clerk of a justice of the peace is an officer unknown to the law, and, if a party acts upon information obtained from that source, it will be at his peril. Ibid. 391.

3. Where the petition states that the petitioner appeared after the time he was required by law to do so, and was informed by a clerk of the justice that no judgment had been rendered, and this statement is followed by an allegation that the judgment was afterwards rendered, this allegation is but a conclusion of the party based upon such information, and is not sufficient to show that the judgment before the justice was not the result of his own negligence. Ibid. 391.

4. If the petition had stated that he examined the docket and found no judgment, and based the allegation that the judgment was rendered afterwards, upon that fact, the averment would have been good. Ibid. 391.

CHANCERY.

JURISDICTION—IN MATTERS OF POLITICAL CHARACTER.

1. The subject matter of the jurisdiction of courts of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. It has no jurisdiction in

CHANCERY.

JURISDICTION—IN MATTERS OF POLITICAL CHARACTER. *Continued.*

matters merely criminal or immoral, which do not affect any right of property, nor do matters of a political character come within its jurisdiction. *Sheridan et al.* v. *Colvin et al.* 237.

2. A court of chancery has no jurisdiction to interfere with the public duties of any department of government, except under special circumstances, and where necessary for the protection of the rights of property. Ibid. 237.

See INJUNCTIONS, 3, 4.

JURISDICTION—REMEDY AT LAW.

3. *To supply lost transcript from justice's docket.* The loss of a justice's transcript filed in the circuit court, under which a sale of land was made, and under which a party claims title, affords no ground for equitable relief against the prosecution of an action of ejectment against him, as the remedy at law is complete by motion, on notice, in the circuit court, to supply and restore the transcript. *Clingman et al.* v. *Hopkie*, 152.

4. *To restrain city from acts which will cause illegal taxation.* See INJUNCTIONS, 5.

5. *Correcting mistake in attachment bond.* See MISTAKE, 1.

SUFFICIENCY OF BILL.

6. *To restrain the tearing up sidewalk and replacing same by city.* A bill to enjoin city authorities from tearing up a sidewalk in front of complainant's premises and replacing the same by a new one, on the ground that, with slight repairs, the old one would answer for several years, and the change would burden the citizens with heavy taxes and assessments, which fails to show whether the city is incorporated, and makes no reference to its charter, is clearly defective and obnoxious to a demurrer. *Brush* v. *City of Carbondale*, 74.

BILL OF REVIVOR.

7. *Whether necessary on death of one of several complainants.* On bill to foreclose a mortgage by several partners, given to secure a partnership debt, a bill of revivor is not necessary on the death of one of the partners, but, the death being shown to the court, the suit may be prosecuted by the survivors. *Roberts et al.* v. *Stigleman et al.* 120.

FILING A FURTHER OR AMENDED ANSWER.

8. After replication is filed, the defendants in a chancery suit can not put in any amended or new answer without leave of court, except when required to do so by the court; and if the same is so filed without leave or requirement of the court, it will be disregarded. *Roberts et al.* v. *Stigleman et al.* 120.

9. When new answers are filed after replication without leave or order of the court, and the cause is heard without any replication to

CHANCERY. FILING A FURTHER OR AMENDED ANSWER. *Continued.*

the new answers, they will not be taken as true, but will be disregarded. *Roberts et al.* v. *Stigleman et al.* 120.

SWORN ANSWER.

10. *When it must be proved.* If a sworn answer to a bill in chancery sets up new matter in defense, not responsive to the bill, as, a homestead exemption to a bill to foreclose a mortgage, the defendant must sustain the same by proof. Ibid. 120.

SPECIFIC PERFORMANCE.

11. *Discretionary.* An application for the specific performance of a contract is addressed to the sound legal discretion of the court; and even where a legal contract is shown to exist, it will not be decreed as a matter of course. *Bowman* v. *Cunningham*, 48.

12. *Contract must be certain and fair.* As a general rule, courts of equity will decree a specific performance where the contract is in writing, and is certain and is fair in all its parts, and is based upon an adequate consideration, and is capable of being performed, but otherwise not. Ibid. 48.

13. If the contract is not certain, and it is not clear, from the evidence, that the exact terms thereof were agreed upon and understood by the parties, and the contract is not fair in all its parts, it will not be specifically enforced. Ibid. 48.

14. Where an application is made to a court of equity to decree the specific performance of a contract, if it appears the contract is unfair, unjust, or dishonest, the court will not lend its aid to compel its performance. *Proudfoot* v. *Wightman*, 553.

15. *Fraudulent conduct of agent.* If an agent authorized to sell land at a given price, three years after, when the value has greatly advanced and is rapidly rising, sells the same at the price named, and at a great sacrifice, without informing his principal of the rise in value, this will be such a fraud upon the principal, as that a court of equity may refuse to enforce a conveyance to the purchaser. Ibid. 553.

16. *Of contract, where the party's right grows out of a prior champertous agreement.* A court of equity will not lend its aid to decree the specific performance of one contract which grows directly out of another, which is illegal, immoral, or tainted with champerty. *Bowman* v. *Cunningham*, 48.

17. *Of contract rescinded.* If, after the making of a written contract, a dispute arises as to its terms, etc., and the complainant proposes to set aside the entire negotiations, and for the surrender of all papers held by either party, which is accepted by the other party, the complainant can not have a decree for the specific performance of the contract thus rescinded. Ibid. 48.

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

18. *Of a contract to convey land in consideration of acts done enhancing value of residue.* If the equitable owner of land agrees to convey an interest therein, subject to the approval of the holder of the legal title, to another, if the latter will build a depot and side track near the same, and such party does build the same, at his own expense, with the knowledge of the holder of the legal title, whereby the value of the tract is greatly enhanced, a court of equity will enforce the contract, subject to the rights of the holder of the legal title for any sum due him. *Borders et al.* v. *Murphy*, 81.

19. *Contract made by an agent.* A bill for the specific performance of a contract of sale made by an agent, which fails to show that the person executing the same was the agent of the owner, duly authorized, either by any charge, or by the contract so far as it is set out, is bad on demurrer. *Roby* v. *Cossitt et al.* 638.

20. *Bill must be filed in reasonable time, and show a readiness to perform.* Where a contract was made for the sale of land in February, 1867, for the sum of $52,000, one-third of which was to be paid in hand, and the balance in two equal annual installments, with interest, and the purchaser paid only $500 down, and did not offer to make the several payments when due, and did not file his bill for specific performance until in July, 1873, when the property had greatly risen in value: *Held*, in the absence of any excuse being shown, that the delay in offering to perform, and in filing his bill, were such that equity could not aid him. Ibid. 638.

21. If a vendee desires to insist upon the performance of a contract of sale, he should tender the purchase money as the same falls due, and show a readiness and willingness to perform on his part, and if the vendor refuses to comply, file his bill at once. He will not be allowed to lie still to speculate upon the chance of a rise in the property. Ibid. 638.

22. All contracts with reference to the sale of land, where time is not of the essence of the contract, must be performed or rescinded within a reasonable time, and if there has been any unusual delay that can not be explained consistently with good faith, equity will hesitate to enforce a specific performance. Ibid. 638.

23. Where the purchaser of land delays offering payment of the purchase money for five months after the stipulated time for payment, without any excuse therefor, his right to call for a specific performance will be thereby precluded, unless the stipulated time for payment has been waived. *Mix et al.* v. *Balduc*, 215. *What would constitute a waiver in such case.* See CONTRACTS, 10.

24. *Excuse for not performing.* The fact that a third party informed the purchaser of land that the owner desired to have the execution of the contract postponed until he could settle with other

CHANCERY. SPECIFIC PERFORMANCE. *Continued.*

parties claiming to have contracts for the same property, does not relieve the vendee from the duty to tender performance of the contract, if he intends to insist upon its enforcement. *Roby* v. *Cossitt et al.* 638.

25. *Degree of proof required.* In an ordinary chancery case, the complainant must establish the material allegations of his bill by a preponderance of the evidence; but on bill for the specific performance of a contract for the sale of land made by an agent under a parol authority, the burden of proof is thrown upon the complainant to establish the power by something more than a bare preponderance of evidence. *Proudfoot* v. *Wightman*, 553.

REMOVING CLOUD UPON TITLE.

26. Where a party sells real estate under execution as the property of his debtor, with either actual or constructive notice of a *bona fide* sale and conveyance to another before the judgment became a lien, the owner may have the sheriff's sale set aside as a cloud upon his title. *Phillips* v. *Pitts & Co.* 72.

RELIEF AGAINST PENALTY.

27. *As to penalty to secure prompt payment of note.* Where a party gives his promissory note for money borrowed, payable in one year, with ten per cent interest, and with thirty per cent per annum interest after maturity, if not paid when due, as liquidated damages, a court of equity will not relieve him from the penalty, where the payee has practiced no deception and done no act to mislead him and induce him to make the note. His ignorance that the note contained such a provision, when he was able to read the same, affords no ground for equitable relief. *Downey, Admr.* v. *Beach*, 53.

DECREE PRO CONFESSO.

28. *Against unknown heirs.* It is not error to render a decree *pro confesso* against unknown heirs, where it does not appear, from the record, that they were minors. *Newlin et al.* v. *Snyder et al.* 528.

AWARDING EXECUTION AT SUBSEQUENT TERM.

29. *Jurisdiction.* Where a decree of foreclosure against two defendants, one of whom was brought into court by publication, provided that the master appointed to sell should report any deficiency after the sale, and that an execution issue against the defendants personally liable to pay the debt for such deficiency, and, about three years and a half after such report, the court ascertained the deficiency, and awarded an execution against one of the defendants, without any new notice of the intended action, under which land was sold: *Held*, that the court had no jurisdiction to make the supplemental order awarding the execution, and that the sale was a nullity. *Mulvey* v. *Carpenter et al.* 580.

CHANCERY. *Continued.*

REINSTATING CAUSE AT SUBSEQUENT TERM.

30. *After final decree.* Where a final decree is made, in a suit in chancery, confirming the master's sale of property, and the cause goes off the docket, and it is, at a succeeding term, reinstated, without notice to any adverse party whose interests are to be affected, all subsequent orders will be without authority of law, and void. *Mulvey* v. *Carpenter et al.* 580.

PROCEEDING TO CONTEST AN ELECTION.

31. *In chancery.* See ELECTIONS, 8 to 13.

DAMAGES FOR DETENTION OF DOWER.

32. *Remedy not in chancery when petition has been filed for assignment of dower.* See DOWER, 6, 7.

ENFORCEMENT OF LIENS.

33. *Remedy in chancery.* See LIENS, 8.

"BURNT RECORDS ACT."

34. *Decree establishing title, in case of a dispute as to ownership.* See "BURNT RECORDS ACT," 1.

OF THE DECREE.

35. *Want of certainty.* See DECREE, 1.

PRESERVING THE EVIDENCE.

36. *On assessment of damages on dissolution of injunction.* See INJUNCTIONS, 14.

CHICAGO, CITY OF.

CONTROL OF POLICE FORCE.

1. *Superseding the board of police—under the act of April* 10, 1872. The city of Chicago having been reincorporated under the act of April 10, 1872, to provide for the incorporation of cities and villages, the city council possess the power to provide for the appointment of a city marshal, and to vest him with the entire control of the police force, and to reorganize the police department by ordinance, and to carry out and give effect to the provisions of such ordinance when passed. *Sheridan et al.* v. *Colvin et al.* 237.

2. And when such an ordinance is passed, it takes the functions given to the board of police, by the act of their creation, away from them, and confers them upon the officers named in the ordinance. Ibid. 237.

3. Where the city council, under the act of 1872, have reorganized the police department of the city, and provided for the control and management thereof, the authority of the board of police over the police force of the city, being inconsistent with the plenary power conferred upon the city council over the subject matter by the act of 1872, ceases. Ibid. 237.

CHICAGO, CITY OF. CONTROL OF POLICE FORCE. *Continued.*

4. The city council have no power to pass an ordinance abolishing the board of police, or the office of commissioner of such board, but they may deprive them of all their functions as city officers; and such an ordinance can only be sustained as applying to the board of commissioners in their capacity of city officers. ***Sheridan et al.* v. *Colvin et al.*** 237.

CITIES AND VILLAGES.

CONTROL OF POLICE FORCE.

In whom vested, under act of April 10, 1872. See CHICAGO, CITY OF, 1 to 4.

CITY COURTS.

OF THEIR ORGANIZATION AND JURISDICTION.

Construction of act of 1874. See COURTS, 7.

CLOUD UPON TITLE. See CHANCERY, 26.

COLLATERAL SECURITY.

FOR WHAT INDEBTEDNESS HELD.

1. *When held for other indebtedness than that for which it is specially pledged.* If a party executes an agreement to secure past and future loans, by which all collaterals given and thereafter to be given to secure the payment of specific notes for money loaned to him, are to apply generally to all notes held at any time by the party loaning, notes afterwards pledged for a special loan will not only be a security for the particular loan then made, but for the payment of all notes held by the lender, regardless of the manner in which they are secured, or their date. *Buchanan* v. *The International Bank*, 500.

2. In such a case, so far as future advances are made, the contract is in the nature of a mortgage, and will be binding between the parties for any and all advances made prior to the time of third parties acquiring an interest in the collaterals pledged. Ibid. 500.

ACCOMMODATION PAPER.

3. *May be taken as a security.* If a party, taking notes as collateral security for money loaned, and for past and future advances, has knowledge that they were accommodation notes, this will be no reason why he may not enforce their payment for future advances, as against one acquiring rights after such advances are made. Ibid. 500.

COLOR OF TITLE. See LIMITATIONS, 1.

COMPLAINT.

FOR VIOLATION OF ORDINANCE.

Against selling liquor without license. See INTOXICATING LIQUORS, 1.

CONFESSION OF JUDGMENT.

UNDER WARRANT OF ATTORNEY. See JUDGMENTS, 3 to 7.

CONSIDERATION.

WHAT IS SUFFICIENT.

1. *Generally.* Any act which is beneficial to one party, or a disadvantage to the other, is a sufficient consideration to support a contract. *Buchanan* v. *The International Bank*, 500.

2. *To support a settlement of a disputed claim.* Where there was a claim made by one party that a deed for land, executed by him to another, was only in the nature of a security for a debt, and that he was entitled to the surplus of the proceeds of the sale of the land, over the amount of his indebtedness, and the other party claimed that the deed was absolute, and not by way of security, and the parties settled the controversy by dividing the surplus, it was *held*, that there was sufficient consideration to support the settlement. *Nichols* v. *Bradsby*, 44.

3. *On sale of land.* Where the owner of land gave a written memorandum to a party, stating that he would sell him a lot of land for a certain price, to be paid within a time named, but there was no agreement expressed in the writing, by the purchaser, to pay the price, and the purchaser afterwards built a corn crib and barn, and sunk a well, on the premises, and kept up the fences and paid the taxes, this constituted a sufficient consideration to make the agreement binding on the vendor. *Mix et al.* v. *Balduc*, 215.

ILLEGAL CONSIDERATION.

4. *Will not support a contract.* Courts will not lend their aid to enforce an executory contract founded upon an illegal consideration. *Paton et al.* v. *Stewart*, 481.

FAILURE OF CONSIDERATION.

5. Where A executed his promissory note, payable to B, and delivered it to C, for the purpose of having it discounted, and C delivered the same to B, but B paid nothing for it: *Held*, that there was a failure of consideration, and that B could not recover in a suit on the note against A. *Winkelman* v. *Choteau et al.* 107.

6. And the fact that A was indebted to B at the time of giving the note to him, and that B told C to collect the note and give the firm of which B was a member credit for it, will not entitle C to recover on the same, where it appears that the note was not given on account of the indebtedness of A to B. Ibid. 107.

CONSIDERATION. FAILURE OF CONSIDERATION. *Continued.*

7. If a promissory note is given, with a guaranty of payment, in consideration that the payee shall dismiss a proceeding in bankruptcy against the maker, and such proceeding is not dismissed, there will be a failure of the consideration, which may be set up by the guarantor in a suit upon the guaranty by the payee. *Paton et al.* v. *Stewart*, 481.

8. *As respects the title under judicial sale.* See SALES, 14, 15.

WANT OR FAILURE OF CONSIDERATION.

9. *Can not be pleaded by acceptor of bill of exchange.* See BILLS OF EXCHANGE, 1.

PAYMENT OF USURIOUS INTEREST.

10. *As a consideration for an agreement to extend time of payment of a note.* See SURETY, 4.

CONSIGNEE.

RIGHTS AS AGAINST CREDITORS OF CONSIGNOR.

1. Where a party consigns goods to another, and draws upon the consignee for funds, accompanying the draft with the delivery of the bill of lading or shipping receipt as collateral security for its payment, the acceptance and payment by the consignee of the draft, accompanied with the bill of lading or shipping receipt, vests in him a special property in the goods sufficient to maintain replevin against an officer who, after such delivery, attaches them upon a writ against the general owner. *Peters et al.* v. *Elliott et al.* 321.

2. In such case, although the draft is not paid until after the officer has levied on the goods, still, if the draft and shipping receipt were delivered to the payee of the draft before the levy, such delivery will be regarded as made for the use of the consignee, and when he pays the draft, his right to the goods will relate back to the time of the delivery of the draft and shipping receipt to the payee of the draft, and this without reference to whether the payee of the draft paid any consideration therefor to the owner or not, if the consignee paid it in good faith, without notice of any attachment or levy on the goods. Ibid. 321.

CONSOLIDATION OF DEMANDS.

BEFORE JUSTICES OF THE PEACE. See JUSTICES OF THE PEACE, 5.

CONSTITUTIONAL LAW.

SPECIAL LEGISLATION.

1. *In reference to charters of municipal corporations.* The clause of section 22, article 3, of the constitution, which prohibits the General Assembly from passing local or special laws incorporating cities,

CONSTITUTIONAL LAW. SPECIAL LEGISLATION. *Continued.*

towns or villages, or changing or amending the charter of any city, town or village, is applicable to and restrictive of the General Assembly, in the enactment of charters or amendments to charters for cities and villages. It has no reference to past legislation, but simply prescribes the limit of future legislation in this respect. *Covington v. City of East St. Louis*, 548.

2. *Ordinances of municipal corporations need not be uniform throughout the State.* See CORPORATIONS, 5, 6.

PERPETUAL EXEMPTION FROM JURY DUTY.

3. *Power of the legislature.* See JURY, 4.

RAILROADS—LIABILITY UNDER ACT 1855.

4. *For expenses occasioned by death, etc., without fault of the company.* See RAILROADS, 1.

DELEGATION OF LEGISLATIVE POWER.

5. *To whom.* See JUDICIAL AND LEGISLATIVE POWER, 3, 4.

JUDICIAL POWER OF THE STATE.

6. *As distinguished from the political power.* See same title, 1, 2.

TAXATION FOR CORPORATE PURPOSES.

7. *And herein, what is a corporate purpose.* See TAXATION, 9, 10, 11.

COUNTY TAX—RATE OF LEVY.

8. *To what the constitutional restriction applies.* See TAXATION, 6.

CONTESTED ELECTIONS. See ELECTIONS, 8 to 14.

CONTINUANCE.

DILIGENCE IN PREPARING FOR TRIAL.

1. *What is sufficient.* A defendant was indicted for a crime, and employed and paid an attorney, and was tried, and the jury failed to agree, and he was remanded to jail, and there remained for several weeks, when he was again brought into court, and then, for the first time, notified that his attorney had abandoned his case, and it was set for trial on the next day, and he then had subpœnas issued for witnesses, and on the next day, when the case was called for trial, he made a motion for a continuance, supported by an affidavit showing these facts, and showing, also, that he had relied upon his attorney to prepare his case for a second trial, and that he did not know that the attorney had abandoned the case until notified of it, in open court, the day before; that, as soon as notified of it, he had subpœnas issued for witnesses, giving their names and residences, and stating what facts he expected to prove by them, which facts were material and necessary to a proper defense, and that, owing to the shortness of the time intervening between his ascertaining that his attorney had abandoned

CONTINUANCE. DILIGENCE IN PREPARING FOR TRIAL. *Continued.*

the case and the time of its being called for trial, the witnesses had not been found: *Held*, that sufficient diligence was shown, and the continuance should have been granted. *Wray* v. *The People*, 212.

ON THE GROUND OF SURPRISE.

2. Where the petitioner, in a proceeding to enforce a mechanic's lien, testified that he had taken a note for his work, and turned it over to a third party, a motion by the attorney of petitioner for a continuance, on the ground of surprise by such testimony, was overruled: *Held*, the overruling of the motion was not error. *Clement* v. *Newton et al.* 427.

AMENDMENT OF AN ACCOUNT.

3. Where the declaration contained only the common counts, and there was a stipulation between the parties that the plaintiff might introduce any evidence that would be admissible under any special count that could be drawn on the contract, and the plaintiff amended his account by adding an item thereto, for which a special count had been drawn: *Held*, that, under the stipulation, evidence as to such item could have been introduced without amending the account, and it was not error to refuse a continuance on account of such amendment. *Dobbins et al.* v. *Higgins et al.* 440.

ATTORNEY IN THE LEGISLATURE.

4. Where an affidavit for the continuance of a cause on the ground that the party's attorney was in attendance in the legislature as a member thereof, fails to show that the attorney was employed in the case prior to the commencement of the session of the legislature, it will not entitle the party to a continuance. *Stockley, Admr.* v. *Goodwin*, 127.

SECOND APPLICATION FOR SAME CAUSE.

5. *Not allowed.* The practice will not sanction a second application to continue a cause made at the same term, and based upon the same state of facts as the first. Ibid. 127.

CONTRACTS.

BARGAIN AND SALE OF LAND.

1. *What constitutes.* A verbal contract made by the owner of land with the father of an infant eighteen months old, that he will give all his land to such infant in consideration of the surrender of such infant by the father to him, to be raised by him as his own child, does not constitute a bargain and sale of the land. *Cuddy* v. *Brown et al.* 415.

2. Such a state of facts might, under some circumstances, raise an equity which a court of equity, upon proper proofs, would carry out and enforce. Ibid. 415.

CONTRACTS. *Continued.*

THERE MUST BE MUTUALITY.

3. Where the obligee in a bond grants the right to purchase certain machines of him, to be re-sold within certain territory, and agrees to furnish the same at a discount, on a credit of six months, and a bond is given to him to secure payments for machines sold, it will not be void for want of mutuality. *Brown* v. *Rounsavell*, 589.

IN RESTRAINT OF TRADE.

4. A contract to furnish a party with sewing machines at a discount, and upon a credit, which provides that such party shall deal exclusively in the machine sold by the party agreeing to furnish, and to purchase the same of him exclusively, contains no such restraint of trade as to render it void. Ibid. 589.

BY WHAT LAW GOVERNED.

5. The law of the place where a contract is made must govern the contract. The existing laws of the State at the time of making a note therein, form a portion of the contract, and the liability of the maker must be determined under them. *Evans* v. *Anderson*, 558.

6. If a promissory note is executed in the State of Indiana, though it does not so appear upon its face, the laws of that State will govern as to the defenses which may be set up against a recovery thereon. Ibid. 558.

7. It is a principle adopted everywhere, that the nature, validity and interpretation of contracts must be governed by the laws of the country where they are made, or are to be performed. Ibid. 558.

8. The validity of a contract of a married woman, in respect to her separate property, or property claimed by her, is determined by the laws of the State where the same is made. *Nixon* v. *Halley*, 611.

9. *As respects the old and new constitutions.* Although the constitution of 1848 has been superseded by the present one, still all rights acquired under it, or under laws passed while it was in force, must be tried by and enforced as though it was in full vigor. *The People ex rel.* v. *Trustees of Schools*, 136.

TIME OF PAYMENT—WAIVER.

10. *As between vendor and purchaser of land.* Where the vendor of land, after the expiration of the stipulated time for payment of the purchase money, distinctly recognizes the right of the vendee to the property, and asks to have refunded to him the taxes on the same for one year that he had paid on it subsequent to the expiration of the stipulated time for payment, the vendee having paid all the other taxes, a waiver of the time stipulated for the payment of the purchase money may be inferred. *Mix et al.* v. *Balduc*, 215.

CONTRACTS. *Continued.*

PRESUMPTION AS TO SIGNING.

11. *That it was done understandingly.* Where an instrument is found with a signature affixed to it, the presumption is, that the party signing it knew its contents, and there is no distinction in this respect between those who can and those who can not write. *Doran* v. *Mullen*, 342.

COMPOSITION WITH A BANKRUPT.

12. *Abuse of the process of the law.* If a creditor commences proceedings in bankruptcy against his debtor, for the purpose of getting a composition to secure his claim, and agrees to dismiss the proceeding on being secured, this is an abuse of the process of the law, and the contract thus obtained will be illegal and void, as being inhibited by a sound public policy. *Paton et al.* v. *Stewart*, 481.

RESCISSION OF CONTRACTS.

13. *Right to rescind for omission of other party.* A slight or partial neglect, on the part of one of the contracting parties, to observe some of the terms or conditions of the contract, will not justify the other party at once to abandon or rescind the same. *Weintz* v. *Hafner*, 27.

14. In order to justify an abandonment of a contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one. The object of the contract must have been defeated or rendered unattainable by his misconduct or default. Ibid. 27.

15. For partial dereliction and non-compliance in matters not necessarily of first importance to the accomplishment of the object of the contract, the party injured must seek his remedy upon the stipulations of the contract itself. Ibid. 27

16. Thus, where a party sold a farm, and agreed to build a barn on the premises, and deliver possession by a given day, it was *held*, that a failure to have the barn completed at the time the second payment fell due, and before the time of delivery of possession, did not justify the purchaser in refusing payment, and authorize him to recover back the sum paid at the making of the contract. Neither would a refusal to give a receipt for the second payment justify a rescission by the purchaser, even if one were required by the contract. Ibid. 27.

17. *Misstatement of vendor as to cost or value.* A mere misstatement by the vendor of property, as to its cost or value, in the absence of any fiduciary relation between the parties, will not authorize a rescission of the contract. *Plummer* v. *Rigdon*, 222.

REPUDIATION BECAUSE UNLAWFUL.

18. *Must extend to all contracts of like kind.* If a party repudiates a contract on the ground that it is unlawful, he must repudiate all

CONTRACTS. REPUDIATION BECAUSE UNLAWFUL. *Continued.*

contracts of the like kind with the same party. He can not claim the benefit of such as are profitable and repudiate those that are unprofitable. *Wolcott et al.* v. *Heath*, 433.

RIGHT OF ABANDONMENT.

19. *Upon failure to pay according to the agreement.* Where, by the terms of a contract, parties performing labor under it are to be paid at the end of each month, for the labor performed to that time, and they are not paid at the stipulated time, and are, by reason thereof, compelled to abandon the work, they have the right to do so, and are entitled to recover for the work done and not paid for, *pro tanto*, at the contract price. *Dobbins et al.* v. *Higgins et al.* 440.

WITHHOLDING MONEY TO PAY SUB-CONTRACTORS.

20. *Of the right to do so—construction of a contract.* Where a contract is made, by which a party undertakes to do the grading on a railroad, and gives a bond for the faithful performance of his part of the contract, he is entitled to receive the compensation provided for in the contract at the times and in the manner therein provided for, and those with whom the contract was entered into have no right to withhold any part thereof for the purpose of paying the hands or sub-contractors on such work, and if they do so, the contractor has the right to abandon the contract and sue for and recover compensation for damages. Ibid. 440.

21. In such case, it seems that the bond given by the contractor for the performance of his contract is relied on, instead of inserting a clause in the contract authorizing the payment of the hands and sub-contractors, and the deduction of such payments from the sum to be paid the contractor. Ibid. 440.

OF AN OFFER TO PAY.

22. *Effect on party's rights.* Where a contract does not provide for any forfeiture, a mere offer to pay an indebtedness created under it, and a refusal to accept, will not preclude the party from afterward enforcing payment. *Berger et al.* v. *Peterson*, 633.

23. *Ability to pay not shown.* The proof of a mere offer to pay money under a contract, without showing an ability to make the payment, can not be regarded as of any force in a suit for the money due. Ibid. 633.

CONSTRUCTION OF CONTRACTS.

24. *Words in popular sense in contracts.* In construing written contracts and writings of parties, the words used will be taken in their ordinary and popular sense. *Stearns et al.* v. *Sweet et al.* 446.

CONTRACTS CONSTRUED.

25. *In respect to sale of patent right.* Where a written agreement recites a sale and conveyance of an interest in a patent right for $1000 paid at the time, and provides that, if the vendee shall fail to realize

CONTRACTS. CONTRACTS CONSTRUED. *Continued.*

that sum, within three years, from sales, the vendor will pay him back the price upon a reconveyance, and is silent as to what efforts shall be made to effect sales, the law will require a reasonable effort on the part of the vendee to make sales, taking into consideration his ability and pecuniary means to engage in the enterprise. *Berger et al.* v. *Peterson*, 633.

26. And where the sale was of a fourth interest in a patent relating to an invention in the making of organs, and the assignee was a foreigner, and unacquainted with our language, and nearly all his means were invested in the purchase: *Held*, that it could not have been the intention of the parties that the assignee should enter upon the manufacture of musical instruments under the patent. Ibid. 633.

27. If an inventor conveys a fourth interest in his patent to another for $1000 cash, and agrees, in writing, to repay the same in three years if that sum can not be realized from sales, upon a reconveyance, and it is shown that he prevented sales from being made, and that the grantee used reasonable exertions to realize his money from sales, according to his ability and means, but without success, the grantor will be liable to repay the price paid, with six per cent interest after the end of the three years and a tender of a reconveyance to him, and the fact that the grantee had, prior to his tender, refused to reconvey, will not change the result. Ibid. 633.

28. *Sale of all the iron manufactured by a party, except as to a certain excess—option as to that.* Where a contract for the purchase of all the iron manufactured up to a certain date by a company, provided that the proportion of white and mottled iron should not exceed ten per cent of the quantity of gray mill iron, and in case of such excess, the purchaser should have the option to reject such excess: *Held*, that the purchaser was bound to accept and pay for all the iron manufactured, except as to such excess, and, also, that unless the option to reject it was manifested in a reasonable time after the quantities were ascertained, and notice thereof given. *Carondelet Iron Works* v. *Moore et al.* 65.

29. *Collateral security—when held for other indebtedness than that for which it is specially pledged.* See COLLATERAL SECURITY, 1, 2.

30. *Composition agreement between debtor and creditor—construed.* See DEBTOR AND CREDITOR, 4 to 7.

31. *Indorsement of interest paid, "to" a day named.* See INTEREST, 2.

EXTENSION OF TIME TO A PRINCIPAL.

32. *What will amount to an agreement to that effect.* See SURETY, 2.

CONTRACTS. *Continued.*

ABANDONMENT BY CONSENT.

33. *Right of recovery for services performed.* See ACTIONS, 4.

SALE OF GRAIN FOR FUTURE DELIVERY.

34. *Whether an absolute sale or merely a contract for a sale.* See SALES, 8.

GAMING CONTRACT.

35. *Sale of grain for future delivery—not necessarily a gaming contract.* See SALES, 10, 11, 12.

RIGHT TO DISCHARGE AN EMPLOYEE.

36. *Before the expiration of his term of employment.* See MASTER AND SERVANT, 1, 2.

CONTRIBUTION

AS BETWEEN CO-SURETIES. See SURETY, 6, 7.

CONVEYANCES.

DELIVERY OF A DEED.

1. *Presumption as to time* It will be presumed, in the absence of sufficient evidence to the contrary, that a deed for land was delivered on the day it bears date, although it was acknowledged afterwards. *Hardin* v. *Crate*, 533

CORPORATIONS.

MUNICIPAL CORPORATIONS.

1. *Ordinances must be equal in their operation as between individuals.* Where power is conferred upon a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, it can not, in the exercise of that power, enact ordinances that are unreasonable, oppressive, or such as will create a monopoly. *Tugman* v. *City of Chicago*, 405.

2. An ordinance which makes an act done by one penal, and imposes no penalty for the same act done, under like circumstances, by another, can not be sanctioned or sustained, because it would be unjust and unreasonable. Ibid. 405.

3. An ordinance which prevents one citizen engaging in a particular kind of business in a certain locality under a penalty, whilst another is permitted to engage in the same business in the same locality, is not only unreasonable, and therefore void, but its direct tendency is to create a monopoly, which the law will not tolerate. Ibid. 405.

4. The fact that certain persons were engaged in a particular kind of business in a given locality at the time of the adoption of an ordinance, would not authorize the municipal corporation, by such ordi-

CORPORATIONS. MUNICIPAL CORPORATIONS. *Continued.*

nance, to permit such persons to continue their business, whilst it prohibited others from engaging in the same business in the same locality. *Tugman* v. *City of Chicago*, 405.

5. *Ordinances need not be uniform throughout the State.* The General Assembly has the power to delegate legislative authority incident to municipal governments to cities, but this can only be done by general law, under the constitution of 1870. When, however, it is done by such law, the constitutional mandate is fully complied with, and the ordinances to be adopted by different municipalities, under the power so conferred, may be as variant in their terms as the varying municipal necessities or sense of public policy, in those who exercise the legislative authority, may require. *Covington* v. *City of East St. Louis*, 548.

6. All ordinances are necessarily local in their application—that is, they apply only to the municipality by which they are made, and can have no effect beyond it; and to hold that they are void because they are not of general and uniform operation throughout the State, would be to hold that it is impossible to invest municipal corporations with authority to make ordinances. Ibid. 548.

7. *Power to regulate the business of slaughtering.* Where one section of an act of the legislature conferred general power upon the board of health of a city to enact such by-laws, rules, regulations, etc., as they might deem advisable to promote and preserve the health, safety and sanitary condition of the city, etc., and another section of the same act provided that the common council of the city should have power to regulate and control the slaughtering of all animals in the city, etc., it was *held*, that, whilst the former section, taken by itself, was broad enough to confer power on the board of health to regulate slaughter houses, etc., yet, when considered in connection with the latter section, the power was in the common council, and not in the board of health. *Tugman* v. *City of Chicago*, 405.

8. *Extending boundaries of a city—power of city council.* The charter of a city existing at the time of the adoption of the present constitution, provided that any tract of land adjoining such city, laid off into city or town lots, a plat of which being duly recorded, etc., should be and form a part of said city, provided the city council should so declare. In 1875, the city council declared a tract of land, which came within the requirements of the charter, a part of said city: *Held*, that the action of the city council was lawful, and that such territory thereby became a part of the city. *Covington* v. *City of East St. Louis*, 548.

9. The general law, in force July 1, 1872, to "provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," did not operate to repeal the special

CORPORATIONS. MUNICIPAL CORPORATIONS. *Continued.*

provisions of a charter, on the same subject, adopted prior to the new constitution. *Covington* v. *City of East St. Louis*, 548.

10. *Whether courts will interfere with the exercise of discretionary powers.* A city incorporated under the general law has a large discretion as to the opening, grading and repairing of streets and sidewalks, in respect to the time, manner and cost of the same, in the exercise of which its power will not be controlled by the courts, unless there is great abuse operating oppressively upon individuals. *Brush* v. *City of Carbondale*, 74.

11. Where persons or officers are acting within well recognized powers, or exercising a discretionary power, a court of equity has no jurisdiction to interfere, unless the power or discretion is being manifestly abused to the oppression of the citizen. Ibid. 74.

12. *Duty and liability in respect to defective sidewalks.* See HIGHWAYS, 1, 2.

13. *Injury from defect in street—contributory negligence by careless driving.* See HIGHWAYS, 3.

14. *Police regulations—licensing vehicles.* See LICENSE, 1.

15. *Villages under special charter may become incorporated under general incorporation law—duty of the village council in respect thereto.* See MANDAMUS, 2.

16. *Delegation of legislative power to municipal corporations.* See JUDICIAL AND LEGISLATIVE POWER, 3, 4.

17. *School townships are not municipal corporations.* See SCHOOL TOWNSHIPS, 1.

COSTS.

ON REMITTITUR IN SUPREME COURT.

1. Where the defendant below brings the cause to this court, and the plaintiff remits here a portion of the judgment, which was one of the grounds of error assigned, the party thus entering the *remittitur* will be required to pay all the costs which had accrued in this court up to that time. *Nixon* v. *Halley*, 611.

COST BOND.

TIME TO OBJECT THERETO. See PRACTICE, 10.

COUNTY COURTS.

NATURALIZATION.

Jurisdiction of county courts. See NATURALIZATION, 1, 2.

COURTS.

CIRCUIT AND SUPERIOR COURTS OF COOK COUNTY.

1. *No more than one judge should sit at a time.* It is error for the judges of the Superior Court of Cook county, or circuit judges assisting them, to sit as a body or in bank; but each step taken in a cause should be by a single judge, and it should so appear from the record. *Courson* v. *Browning et al.* 208.

2. The various steps in a cause may be before different judges. One may settle a portion or all of the pleadings, another hear and determine a motion or motions, and another try the case, decide the motion for a new trial, and settle and sign the bill of exceptions; but the record should show what is done by each judge in the case, and that he acted alone in what was done. Ibid. 208.

3. Where the record shows that four judges were present trying a cause, one of them presiding over a full bench, it is such error as will compel a reversal of the judgment. Ibid. 208.

4. *What the record should show when a circuit judge presides.* Where a circuit judge holds the Superior Court, the record should show what judge presided, and that he did so by request of the judges of said court, as a branch court, in pursuance of the statute. *Owen* v. *Stevens*, 462.

5. Where the record shows that there were three judges of the Superior Court present at the trial, and further shows that a circuit judge actually presided on the trial, it is contradictory and informal, and shows not such an organization of the court as litigants are entitled to have when their cases are tried. Ibid. 462.

6. *Whether held by one or more judges.* Although the *placita*, or convening order, sent up in a record from the circuit court of Cook county, may show that the five judges were present and sitting, together with another assistant judge, yet if the bill of exceptions shows that the cause was tried by the latter judge alone, the judgment will not be reversed for the defect in the *placita*. *Brown* v. *Rounsavell*, 589.

CITY COURTS.

7. *Of their organization and jurisdiction—construction of act of July 1, 1874.* The act of July 1, 1874, effected changes in the city courts where the local acts otherwise provided, first, by changing the name of the courts; second, by making their jurisdiction concurrent with the circuit court in all civil cases, in appeals from justices of the peace, and in all criminal cases, except treason and murder, within the city; third, by making the proceedings and practice the same as in circuit courts, and, fourth, by requiring the judges to be elected in the same manner that city officers are elected. *The People ex rel.* v. *The Common Council of the City of Aurora et al.* 218.

COURTS. *Continued.*

ELECTION OF THE JUDGES.

8. It does not require that the judges of the city courts must be elected by a single city, where, before its passage, they were elected by two or more cities. *The People ex rel.* v. *The Common Council of the City of Aurora et al.* 218.

COURTS OF COMMON PLEAS OF ELGIN AND AURORA.

9. *Of their continuance under act of* 1874. The Courts of Common Pleas of Elgin and Aurora, established prior to the adoption of the constitution of 1870, are by that instrument continued in existence until otherwise provided by law, and, by the act of July 1, 1874, in relation to courts of record in cities, they were continued under the name of city courts, to be held by a single judge, to be elected by the voters of both cities. Ibid. 218.

CREDITORS.

LIFE POLICY OF DEBTOR.

1. *Whether creditors entitled to proceeds.* See INSURANCE, 1, 2.

CREDITOR OF CONSIGNOR OF GOODS.

2. *Rights as against consignee.* See CONSIGNEE, 1, 2.

JUDGMENT CREDITORS.

3. *Whether they have a preference over other creditors in respect to the estate of deceased debtor.* See ADMINISTRATION OF ESTATES, 6.

CRIMINAL LAW.

PERJURY.

1. *Evidence as to where affidavit was made.* On the trial of one for perjury in making an affidavit, if the State and county are given in the venue of the affidavit, this is ample evidence, in the absence of contrary proof, to show that the oath was administered in the county named in the venue. *Van Dusen* v. *The People*, 645.

2. *Officer administering oath must do so in his district where he has power to act.* On a charge of perjury in making an affidavit, the oath being administered by a township assessor to a party being assessed by him, if the proof fails to show that the affidavit was sworn to in the assessor's township, where he alone has power to act, no conviction can be had. Ibid. 645.

3. The officer who administers an oath must have legal and competent authority, or the person taking the oath before him, however false it may be, can not be convicted of perjury. Ibid. 645.

KEEPING OPEN TIPPLING HOUSE ON THE SABBATH.

4. *Of the indictment.* An indictment under section 127 of the Criminal Code of 1845, which charges that the defendant, on the 10th day of March, 1874, the same being the Sabbath day, in the night-time of said day so being the Sabbath day, did unlawfully keep open

CRIMINAL LAW.

KEEPING OPEN TIPPLING HOUSE ON THE SABBATH. *Continued.*

a tippling house, etc., is sufficient, and a motion to quash should be overruled. This statutory offense might be committed during the time embraced between the preceding midnight and the dawn of Sabbath morning. *Kroer* v. *The People*, 294.

5. *What constitutes the offense.* On the trial of a party indicted for keeping open a tippling house on the Sabbath day, the court was asked to instruct the jury that it must be shown by the evidence that the house was kept open for tippling purposes, as on week days, before the defendant could be convicted; but the court modified the instruction by omitting the words "as on week days:" *Held*, there was no error. Ibid. 294.

6. It is not necessary, to constitute the offense under the statute, that the house be kept open as on week days. It will be within the offense named if it is so kept that access may be had thereto on the Sabbath, and facilities afforded for the obtaining of intoxicating drinks, and it is not material whether the access is by the front door or back door, or whether the door is kept open or is only opened on application for admittance. Ibid. 294.

OF A SEVERAL JUDGMENT ON DIFFERENT COUNTS.

7. Where a defendant was found guilty upon two counts in an indictment, one for keeping open a tippling house on the Sabbath day, and one for keeping open a tippling house on Sabbath night, it was proper to render a several judgment on each count. *Kroer* v. *The People*, 294.

DEATH.

DEATH OF ONE OF SEVERAL COMPLAINANTS.

1. *Practice in respect thereto.* See CHANCERY, 7.

DEATH OF JUDGMENT CREDITOR.

2. *Of issuing execution—within what time, and upon what notice.* See ADMINISTRATION OF ESTATES, 7

DEBTOR AND CREDITOR.

TRANSFER OF PERSONAL PROPERTY.

1. *When valid.* Where personal property is turned over by a debtor to his creditor, to secure his indebtedness, the arrangement is binding between the parties, although not followed by such a change of possession as would be binding upon other creditors of such debtor. *Tuttle et al.* v. *Robinson*, 332.

2. Where the owner of personal property turned the same over to a creditor to secure an honest debt, and the possession was delivered to the creditor; and afterwards the attorney of such debtor, under a power of attorney, which only authorized the sale of real estate, sold

DEBTOR AND CREDITOR.

TRANSFER OF PERSONAL PROPERTY. *Continued.*

such property to the creditor in discharge of the debt, it was *held*, that, even if the power of attorney did not authorize such sale, yet, as the debt was not paid in any other way than by such sale, the creditor would still have the claim on the property under the original arrangement, and could hold the same against creditors or other persons. *Tuttle et al.* v. *Robinson*, 332.

WHERE CREDITOR HAS SEVERAL SECURITIES.

3. *He may resort to either or both.* A party loaning money under a general security, may also take special security, and rely upon either or both, and the right to determine which he will enforce, is with him, and not with the borrower, or those claiming under him. *Buchanan* v. *The International Bank*, 500.

COMPOSITION AGREEMENT.

4. *Construction thereof.* A composition agreement should not receive a construction more comprehensive than the reasonable import of its language would signify, and should be limited in its effect to such matters as were within the contemplation and intention of the parties at the time of its execution. *Lipman* v. *Lowitz*, 252.

5. An agreement by which a creditor agrees to take 25 per cent on each and every dollar that his debtor owes and is indebted to him, in full discharge and satisfaction of the several debts and sums of money that the debtor owes and stands indebted to him, does not affect any debts which may afterwards accrue to the creditor. Ibid. 252.

6. Where a creditor held several notes of his debtor, and indorsed one of them to a third party, and afterwards, and whilst said indorsed note belonged to the indorsee, made a composition agreement with his debtor, whereby he released and discharged him from all debts and sums of money then due and owing from such debtor to him, stating the aggregate amount of such indebtedness: *Held*, that this agreement would not affect the right of the creditor to collect from the debtor whatever sum he might afterwards have to pay, as indorser of the note so indorsed before the execution of the composition agreement. Ibid. 252.

7. And in such case it would not affect the right of recovery of such indorser as against the maker, that the former paid the note to the indorsee by giving his own note therefor instead of paying the money. Ibid. 252.

COMPOSITION WITH A BANKRUPT.

8. *Abuse of the process of the law.* If a creditor commences proceedings in bankruptcy against his debtor, for the purpose of getting a composition to secure his claim, and agrees to dismiss the proceeding on being secured, this is an abuse of the process of the law, and

DEBTOR AND CREDITOR.

COMPOSITION WITH A BANKRUPT. *Continued.*

the contract thus obtained will be illegal and void, as being inhibited by a sound public policy. *Paton et al.* v. *Stewart*, 481.

COLLATERAL SECURITY.

9. *When held for other indebtedness than that for which it was specially pledged.* See COLLATERAL SECURITY, 1, 2.

DECREE.

WANT OF CERTAINTY IN DECREE.

1. Where a decree of foreclosure against two defendants, one of whom held the legal title to the property in trust for the other, provided that, on the coming in of the master's report of sale, an execution should issue on the decree for any deficiency not realized by the sale against "the defendants who are personally liable:" *Held*, that the order was indefinite and uncertain as to which was personally liable, but being joint against the "defendants," no execution could issue against one only of them. *Mulvey* v. *Carpenter et al.* 580.

TERM OF COURT NOT AUTHORIZED.

2. *Decree void—but if re-entered at a subsequent term, it may be valid.* See TERMS OF COURT, 1, 2.

DEFAULT.

SETTING DEFAULT ASIDE.

1. *In chancery—how far discretionary.* The setting aside of a default in a chancery suit is a matter of discretion, the exercise of which by the court can not be inquired into by this court on appeal or writ of error. *Powell et al.* v. *Clement et al.* 20.

2. *When properly refused.* Where the return of service was regular, in a suit to foreclose a mortgage, and one of the defendants, after default, decree of foreclosure, sale and confirmation thereof, appeared and asked to have the default set aside, and he be allowed to answer, on his affidavit showing a variance between the original summons and the copy delivered by the officer: *Held*, that the motion to set aside the default was properly refused. Ibid. 20.

DELEGATION OF LEGISLATIVE POWER.

TO WHOM. See JUDICIAL AND LEGISLATIVE POWER, 3, 4.

DELIVERY.

DELIVERY OF DEED.

1. *Presumption as to time.* See CONVEYANCES, 1.

ON SALE OF PERSONAL PROPERTY.

2. *What amounts to a delivery.* See SALES, 5, 6, 7.

DEMAND.

BEFORE BRINGING EJECTMENT.

1. *Of the demand.* See EJECTMENT, 2.

BEFORE BRINGING REPLEVIN.

2. *Whether demand necessary.* See REPLEVIN, 1, 2.

DISCRETIONARY.

SETTING ASIDE DEFAULT IN CHANCERY

1. *How far discretionary.* See DEFAULT, 1, 2.

GRANTING SPECIFIC PERFORMANCE.

2. *Addressed to sound legal discretion of court.* See CHANCERY, 11.

DIVISION FENCES. See FENCES, 1.

DIVORCE AND ALIMONY.

ALIMONY.

1. *As to amount allowed.* Courts of equity will act upon a rule of just and fair proportion of the alimony allowed, to the estate of the defendant, in rendering a decree for alimony. *Ross* v. *Ross*, 402.

2. A decree which gives to the complainant, as alimony, substantially all of the defendant's property, is manifestly wrong. Ibid. 402.

3. *Vesting the fee in the wife.* The practice of vesting the fee of real estate in the wife, by a decree for alimony, although sometimes sanctioned by this court under special circumstances, is objectionable. Ibid. 402.

4. Unless there are special reasons to the contrary, the better mode of decreeing alimony is by an annual allowance, to be held under the control of the court, secured upon the property, or a life estate in the property. Ibid. 402.

5. *For purpose of paying defendant's debts.* Where a decree for alimony gave to the complainant substantially all the defendant's property, and ordered her to pay his debts, it was evident that a portion of the alimony allowed was for the purpose of paying such debts, and it was *held*, that such decree was without precedent, and unwarranted. Ibid. 402.

DOWER.

WHETHER THE RIGHT EXISTS.

1. *In land held under contract to purchase, which is assigned before payment.* If a vendee, before he makes full payment, and before he is able to enforce a conveyance of the land, assigns his contract, and the assignee completes the payment and obtains a deed, the widow

DOWER. WHETHER THE RIGHT EXISTS. *Continued.*

of the first purchaser will acquire no right of dower in the premises. *Morse* v. *Thorsell*, 600.

2. And if the first purchaser, after assignment of his contract, completes the payment with the money received for his assignment, the result will be the same as if the assignee had made the payment to the original vendor, and the widow of the original vendee will have no right of dower. Ibid. 600.

OF THE PETITION.

3. *Allegation in petition respecting title, construed.* An averment in a petition for dower, that petitioner's husband was seized in fee simple of the land, will import that he held the legal title; but if this is followed by the words: and was the owner of the equitable title to the lot in controversy, they will limit the prior allegation, and, when taken together, import that he owned the lot by an equitable title in fee simple. Ibid. 600.

PARTIES.

4. *On petition for dower.* On petition for dower, against a lot owned by a married woman, whose husband has an interest therein by the curtesy or otherwise, the husband is a necessary party defendant. Ibid. 600.

5. *Person made a party defendant will be presumed to have an interest.* If, in a proceeding for dower in land of a married woman, her husband is made a defendant with her, it will be presumed he has an interest, and he will have the right, without disclosing his interest, to put the petitioner upon proof of the title alleged to be in her husband. Ibid. 600.

DAMAGES FOR DETENTION.

6. *Remedy.* On a petition for the assignment of dower, the court has complete jurisdiction, when it has assigned, to cause the widow's damages to be assessed for the detention of her dower; and when she elects to proceed by petition under the statute, and has her dower assigned, she can not then abandon that proceeding and invoke the aid of a court of chancery to take an account of the *mesne* profits. Her remedy in the proceeding by petition is full and complete, and she should pursue it then, and if she fails to do so she will be deemed to have waived it. *Simpson* v. *Ham*, 203.

7. *Appeal.* If the court rule erroneously, in refusing to assess the widow's damages in a proceeding by petition for the assignment of dower, under the statute, the remedy is by appeal, and not by a bill in chancery. Ibid. 203.

DRAM SHOPS. See INTOXICATING LIQUORS, 3, 4.

EJECTMENT.

WHEN THE ACTION WILL LIE.

1. *In favor of tenant where the landlord has put another in possession.* See LANDLORD AND TENANT, 2.

OF A DEMAND BEFORE ACTION BROUGHT.

2. Where a condemnation of land by a railway company is void for want of a proper notice, or defect in the proceedings, and the company has notice that the owner claims the same, and of the grounds of his claim, and finally informs him he will have to sue if he gets anything, even if a demand were necessary, this will obviate the necessity of any formal demand before bringing ejectment. *Chicago and Alton Railroad Co.* v. *Smith*, 96.

ELECTIONS.

OF THE PLACE OF HOLDING AN ELECTION.

1. *As changed from the place appointed.* The place of holding an election was fixed, by the proper authority, at a certain store. When the judges of election and the voters appeared at the store on the day of election, the proprietor forbade them the use of it. They then repaired to a building on the same side of the street, and not more than 50 or 100 feet from the store, and there the poll was opened, and the election proceeded without hindrance, all the voters knowing where the poll was opened, as it was readily seen from the store, and made manifest by the crowd going and returning therefrom. No fraud or improper motive was shown to produce this change, nor did any voter complain that he was deprived thereby of an opportunity to vote: it was *held*, in a proceeding to contest the election, there was no wrong done in holding the election at a place other than that originally appointed. *Dale* v. *Irwin*, 170.

WHO ARE VOTERS—COLLEGE STUDENTS.

2. *What is a "permanent abode."* The "permanent abode" prescribed by the Revised Statutes of 1874 as the criterion of the residence required to constitute a legal voter, does not mean an abode which the party does not intend to abandon at any future time. In the sense of the statute, a "permanent abode" means nothing more than a domicil, a home, which the party is at liberty to leave as interest or whim may dictate, but without any present intention to change it. Ibid. 170.

3. The undergraduates of a college, who are free from parental control, and regard the place where the college is situated as their home, having no other to which to return in case of sickness or domestic affliction, are as much entitled to vote as any other resident of the town pursuing his usual avocation. It is, *pro hac vice*, the home of such students—their permanent abode, in the sense of the statute. Ibid. 170.

ELECTIONS. Who are voters—college students. *Continued.*

4. As a general fact, however, undergraduates of colleges are no more identified with residents of the town in which they are pursuing their studies than the merest stranger. Nor would the simple fact that such students paid a road tax in labor while in attendance at the college, have any weight in determining the question of residence, the law under which such road labor was bestowed not requiring residence to render the party liable, but simply inhabitancy. *Dale* v. *Irwin*, 170.

As to residence of paupers.

5. A party does not forfeit his residence in a precinct in which he was a voter, merely by becoming a county charge and an inmate of the poor house. Ibid. 170.

Registration of voters.

6. *Of voting without registration or proof of right.* Where a person votes at an election without having been registered, and without any proof of right, if it does not appear he was challenged, or any objection made to his voting, the presumption must be that he was a legal voter, and so known to the judges of the election. Ibid. 170.

Of numbered and unnumbered ballots.

7. A numbered ballot should not be rejected in counting the votes at an election, merely because an unnumbered ballot is found folded within the same. Ibid. 170.

Contested elections.

8. *Of the mode of contesting—power of a court of chancery.* When the law provides a mode for contesting an election, that mode must be followed. *Dickey et al.* v. *Reed et al.* 261.

9. Courts of equity have no inherent power to try contested elections, and they have never exercised such power, except in cases where it has been conferred by express enactment or necessary implication therefrom. Ibid. 261.

10. Where an election was held in a city on the question of whether the municipality should become incorporated under the general incorporation act for cities and villages, and a writ of injunction was issued out of the circuit court, enjoining and restraining the board of canvassers from canvassing the returns and declaring the result, it was *held*, that the circuit court had no power to issue the writ, and therefore it was utterly void, and the canvassers were not bound to obey it, and could not be punished for contempt for refusing to obey it. Ibid. 261.

11. *County seat contested elections—jurisdiction in, conferred by implication on courts of equity.* Where courts of equity in this State have taken jurisdiction of contested county seat election cases, it has been upon the express ground that the constitution had provided that

ELECTIONS. CONTESTED ELECTIONS. *Continued.*

county seats should not be removed, except upon a vote of a majority in favor of removal, and that the legislature, in providing for such elections, failed to provide any means of contesting them; and to protect the rights of the majority intended to be secured to them, it was *held*, that the fundamental law, by implication, conferred the power on courts of chancery to hear and determine such cases. *Dickey et al.* v. *Reed et al.* 261.

12. But these cases are an exception to all other cases, and if they are recognized as a class of cases, they are a class in which nothing but county seat questions are embraced, and no other character of election cases is embraced therein, and the rule is not to be considered as extending the power to other or different cases. Ibid. 261.

13. *In chancery.* The proceeding to contest an election, under the act of 1872, is, to all intents and purposes, a chancery proceeding, and subject to all the rules govering the same. *Dale* v. *Irwin*, 170.

14. *Amendment of petition or bill to contest an election.* It is proper to permit amendments to the petition filed by a contestant of an election, under the act of 1872. Ibid. 170.

NATURALIZATION.

15. *Jurisdiction of county courts.* See NATURALIZATION, 1, 2.

16. *Naturalization of adults—effect upon illegitimate children.* Same title, 3.

EMINENT DOMAIN.

PROCEEDING TO CONDEMN RIGHT OF WAY.

1. *When statute requires notice to owner, one to holder of life estate, then deceased, not good as to remainder-man.* Where the charter of a railway company required notice, by publication, to the owner or occupier, or unknown owners of land sought to be condemned, of the application to appoint commissioners, and the company publishes such notice as to one who had held a life estate only, but who was dead, not naming the remainder-man, it was *held*, that the subsequent proceedings condemning the land for right of way were not binding upon the remainder-man, and that he might recover the land appropriated, by ejectment. *Chicago and Alton Railroad Company* v. *Smith*, 96.

2. *When notice must designate owner.* A charter of a railway company authorizing the condemnation of land for right of way, upon giving notice by publication for thirty days, "to the owners or occupiers, or unknown owners, as the case may be, of the intention" to apply for the appointment of commissioners, etc., requires that the notice shall be given specifically to the owner or occupier, if known, —if not, to unknown owners by that designation. A general notice, in such case, will not be sufficient. Ibid. 96.

EMINENT DOMAIN. *Continued.*

STATUTE MUST BE STRICTLY OBSERVED.

3. A proceeding to condemn land for right of way being an extraordinary and summary remedy, the party exercising the power must strictly observe all the requirements of the statute under which he acts. *Chicago and Alton Railroad Company* v. *Smith*, 96.

COMPENSATION—DAMAGE AND BENEFITS.

4. Under the Eminent Domain law of 1852, the owner of land taken by a railroad is entitled to compensation, at all events, to the extent of the value of the land taken, without any deduction for benefits the land may receive from the location or construction of the road; but such benefits may be set off against any damage the land may sustain by the construction of the road. *Todd, Trustee, etc.* v. *The Kankakee and Illinois River Railroad Company*, 530.

5. *Benefits to one piece of land can not be set off against damages to another.* The damage done to one piece of land, through which a railroad is run, can not be compensated by benefits accruing to another and separate piece of land through which it does not run, although belonging to the same person. Ibid. 530.

6. Where a town had been laid out into blocks and streets for many years, and the same had always been recognized, treated and dealt with by the owners and the people as blocks and streets so laid out, such blocks should be treated as distinct tracts of land for the purposes of assessing damages done by a railroad running through any of them, although the plat of the town may not have been made according to the statute. Ibid. 530.

ESTOPPEL.

ACTS MUST INFLUENCE CONDUCT OF ANOTHER.

1. *Levy upon property of one under execution against another.* The silence of a party in asserting his claim of ownership, after a levy upon property has been made under an execution against another, will not estop him from afterwards asserting his rights, as his conduct in such a case does not induce the levy, by causing the officer to believe he is not the owner. *Straus et al.* v. *Minzesheimer*, 492.

MARRIED WOMEN.

2. *Estopped to deny ownership of property in reference to which they have made contracts.* See MARRIED WOMEN, 1.

EVIDENCE.

HEARSAY.

1. *What amounts to hearsay evidence.* On petition for dower, where the record failed to show a legal title in the husband of the petitioner, she, for the purpose of showing an equitable title, testified that her husband purchased the land, and that both he and the vendor told

EVIDENCE. HEARSAY. *Continued.*

her that the husband paid the entire purchase money, and that, on a sale by the latter, the vendor conveyed to the purchaser: *Held*, that what she was told by her husband and his vendor was hearsay evidence, and should have been excluded on objection. *Morse* v. *Thorsell*, 600.

2. *When admissible.* Hearsay testimony is admissible in questions of pedigree. *Cuddy* v. *Brown et al.* 415.

DECLARATIONS AS PART OF THE RES GESTÆ.

3. *In respect to the relation of a party to a note.* If a father, executing a note, signs his son's name, and procures others to become sureties, what he says to the sureties at the time of their signing, as to the son being a principal with him, is competent evidence, as a part of the *res gestæ*, where the son afterwards ratifies the execution of the note. By such ratification, with a knowledge of the facts, the son makes the acts and declarations of the father his own. *Paul* v. *Berry*, 158.

POSITIVE AND NEGATIVE TESTIMONY.

4. *Of their relative weight.* On the trial of an action against a city to recover for an injury received from a defect in a culvert, the court instructed the jury: "that positive evidence is entitled to more weight than negative evidence; and that if twelve men were in a room where there was a clock, and one of them should swear he heard the clock strike, and the eleven should swear they did not hear it strike, then the jury, in such a case, should give a judgment for one against the eleven; and if Henry Alfred and Mrs. Gibson swear they saw a hole in the culvert in question, and twice as many witnesses, equally as credible, say they did not see holes in the culvert, then positive evidence should be taken by the jury:" *Held*, that the instruction was objectionable, and not apt as an illustration, as it omitted the element of the reasonableness of the fact testified to. *City of Greenville* v. *Henry*, 150.

TO CONTRADICT RECORD.

5. *As to appearance of defendant.* Where the record of a cause shows that a defendant appeared and answered the bill filed against him, his statement can not be admitted to overcome the evidence furnished by the record. *Robinson* v. *Ferguson et al.* 538.

PROOF OF BOOK ACCOUNT.

6. Where a witness testified, without objection, in regard to items of an account, many of which he personally knew to be correct at the time they were entered in the books of his employer, years before, but could not remember as to dates and amounts, except by reference to the books, it was error to instruct the jury to disregard all his testimony based upon the books, and upon such matters as he stated he only knew from the books. *Wolcott et al.* v. *Heath*, 433.

EVIDENCE. *Continued.*

PROOF OF HANDWRITING.

7. A witness may have sufficient knowledge of a handwriting to give his opinion as to a disputed signature, although he may never have seen the party write. There are two modes by which a knowledge of the handwriting of another may be acquired, *first*, by having seen the party write, and *secondly*, from having seen letters, bills and other documents purporting to be the handwriting of the party, and having afterwards *personally* communicated with him respecting them, or *acted upon them* as his, the party having known and acquiesced in such acts, founded upon their genuineness, or by such adoption of them into ordinary business transactions of life as induces a reasonable presumption of their being his own writings. *Board of Trustees* v. *Misenheimer et al.* 22.

8. But where the witness has no acquaintance with the handwriting of the party until after a particular signature is denied, and he then examines his report as guardian, filed in the county court, and the signature thereto, he will not be competent to give an opinion as to the genuineness of the signature in dispute, his knowledge being derived under circumstances calculated to bias his mind. Ibid. 22.

OPINIONS OF WITNESSES—EXPERTS.

9. The opinions of witnesses should not be received as evidence, where all the facts upon which such opinions are founded can be ascertained and made intelligible to the court or jury. *City of Chicago* v. *McGiven*, 347.

10. On questions of science, skill or trade, where the facts in issue are not themselves accessible by evidence, persons of skill, called experts, are, from the necessity of the case, permitted to give their opinions in evidence. Ibid. 347.

11. Whether glass placed in a sidewalk to afford light to the area below, is unsafe, by reason of the too great smoothness or slipperiness of its surface, is not a question of science or skill such as to render the opinions of witnesses admissible. Ibid. 347.

12. In an action against a railway company to recover for personal injury received by the plaintiff while coupling cars, upon the question whether the plaintiff used due care, or acted imprudently, it is error to admit in evidence the opinions of witnesses engaged in the same business, as no question of science, skill or trade is involved. The facts only should be proved in such a case, and leave the jury to determine whether due care was used, uninfluenced by the opinions of others. *Hopkins* v. *Indianapolis and St. Louis Railroad Co.* 32.

DEGREE OF PROOF REQUIRED.

13. *A preponderance is sufficient in a civil suit.* In a civil suit, brought merely to recover damages for a personal injury, a mere pre-

EVIDENCE. DEGREE OF PROOF REQUIRED. *Continued.*

ponderance of the evidence is sufficient upon which to base a finding, and it is proper to so instruct the jury. *Miller* v. *Balthasser*, 302.

14. *To establish parol authority of agent to sell land—a bare preponderance not sufficient.* See AGENCY, 4.

15. *To entitle a party to a specific performance—more than a bare preponderance required.* See CHANCERY, 25.

PROOF OF HEIRSHIP.

16. *Of its sufficiency.* See HEIRS, 1.

EVIDENCE OF PARTNERSHIP.

17. *Sufficiency thereof.* See PARTNERSHIP, 1.

SETTLEMENT.

18. *Evidence in respect thereto.* See SETTLEMENT, 1.

BAGGAGE OF PASSENGERS.

19. *Evidence that it was received by the carrier.* See CARRIERS, 1, 2.

SLANDER—PLEA OF JUSTIFICATION.

20. *As evidence of malice.* See SLANDER, 1, 2.

EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILLS OF EXCEPTIONS.

1. *Presumption—in the absence of a bill of exceptions.* In the absence of a bill of exceptions, showing the evidence heard upon the assessment of damages in case of a default, it will be presumed that it was competent and sufficient. *Culver* v. *The Hide and Leather Bank of Chicago*, 625.

2. Where the court orders the entry of judgment at a term subsequent to that at which the verdict is returned, as of the proper term, and the record shows that evidence was heard upon the motion, but the bill of exceptions fails to give the same, it will be presumed that the evidence justified the action of the court. *Howell et al.* v. *Morlan*, 162.

3. If a trial is had, in the court below of a cause, out of its order, and before its time on the docket, all that was done should be embodied in a bill of exceptions and made a part of the record, in order to have the proceeding reviewed in the Supreme Court. *Gardner et al.* v. *Russell*, 292.

4. This court can not presume that the court below committed an error. Until overcome by the record, all the proceedings in the court below will be presumed to conform to the law, and it is for the party alleging error to show it. Ibid. 292.

5. *Should show that it contains all the evidence.* Where the bill of exceptions fails to show that it contains all the evidence introduced upon the trial in the court below, it will be presumed, on appeal to

EXCEPTIONS AND BILLS OF EXCEPTIONS.

BILLS OF EXCEPTIONS. *Continued.*

the Supreme Court, that other testimony was heard, and that the evidence before the court was sufficient to authorize the judgment rendered. *Henry* v. *Halloway*, 356.

EXECUTION.

AFTER DEATH OF JUDGMENT DEBTOR.

At what time and upon what notice execution may issue. See ADMINISTRATION OF ESTATES, 7.

EXEMPTION.

WAGES EXEMPT FROM GARNISHMENT. See GARNISHMENT, 1 to 4.

FENCES.

DIVISION FENCES.

1. *Notice must be given of the selection of viewers, to charge party in default with costs.* If one of the owners of a division fence shall neglect to keep his portion in repair, the other owner can not, without notice to him, select both fence viewers, and charge him with all the costs of the view. The party not notified will not be bound by the action of the viewers, and therefore will not be liable for any expenses on their account. *Thompson* v. *Bulson*, 277.

FORCIBLE ENTRY AND DETAINER.

OF THE REQUIRED POSSESSION.

1. *Action may be brought by heir at law in possession before assignment of dower.* Where the widow, and her son, the only heir of one who died seized of land, continued in possession thereof for twenty-eight years after the death of the owner, dower never having been assigned, and no claim made thereof by the widow, and the son exercised entire control over the land, and worked it as his own, it will be presumed that the mother lived there as a member of her son's family, and not under a claim of dower, and the possession of the son is such as to enable him to maintain forcible entry and detainer against an intruder. *Thompson* v. *Sornberger*, 353.

FOREIGN JUDGMENT.

HOW AUTHENTICATED. See JUDGMENTS, 1.

FORMER DECISION.

NATURALIZATION.

1. *Jurisdiction of county court.* The county courts of this State have jurisdiction to grant certificates of naturalization to aliens. The doctrine on this subject, as announced in *The Board of Supervisors of Knox County* v. *Davis*, 63 Ill. 405, is overruled. *Dale* v. *Irwin*, 170.

FRAUD.

ON A SALE OF PROPERTY.

1. *Representation as to quality.* Where the purchaser of personal property sees the property before taking possession, and has every opportunity to inspect the same, and no concealment is used on the part of the seller, or representations made respecting the quality, to induce the purchaser not to examine the same, the purchaser can not recover on the ground of fraud and deceit. *Carondelet Iron Works* v. *Moore et al.* 65.

FRAUDULENT DEBTS OF BANKRUPT.

2. *Not discharged under bankrupt act.* See BANKRUPTCY, 2.

GAMING CONTRACTS.

SALE OF GRAIN FOR FUTURE DELIVERY.

Not necessarily a gaming contract. See SALES, 10, 11, 12.

GARNISHMENT.

WAGES EXEMPT.

1. *Construction of statute.* Under the statute exempting the wages of a defendant, being the head of a family and residing with the same, to the amount of $25, the plaintiff can only recover whatever may be due from the garnishee in excess of $25 at the time of service of the garnishee. *Bliss* v. *Smith*, 359.

2. The garnishee process will not reach any wages that the debtor may earn after the service, and before the filing of interrogatories and answer. Ibid. 359.

3. Where the answer of a garnishee stated that the debtor whose wages were sought to be reached had been in his employ from the time of service of process, and had collected bills for such garnishee, and that they had had frequent settlements between the time of service of garnishee process and filing his answer, that he had no means of telling how much he had paid the defendant on account of wages during that time, but that at no time had he owed the defendant to exceed $12, and that defendant was, during all the time, the head of a family, and resided with the same, and the answer was not contested, it was *held*, that the plaintiff could not recover. Ibid. 359.

4. An employer has a clear right, notwithstanding he has been served with a garnishee process, to pay to his employee his wages, regularly, for the support of his family, so long as the amount due does not exceed $25 at any one time. Ibid. 359.

TRANSFER OF MONEY BEFORE SERVICE.

5. *To be held for other creditors.* Where a school teacher, being indebted, drew an order on the treasurer of the school district for the sum he was entitled to receive, in favor of his creditor, which was accepted by the board of directors on condition he completed his

GARNISHMENT. TRANSFER OF MONEY BEFORE SERVICE. *Continued*

contract, and the creditor, on the back of the order, authorized the secretary to draw the money for him, which he did, as agent for the creditor, on orders drawn in favor of the teacher before the time limited in the order for payment, and before he was garnisheed by another creditor of the teacher: *Held*, that such agent was not liable to the garnishee process, as the money in his hands at the time did not belong to the teacher, but was held as the agent for the first named creditor. *Johnson et al.* v. *Pace*, 143.

ASSIGNMENT OF NOTE BEFORE MATURITY.

6. Where a garnishee has given a negotiable promissory note to the defendant in attachment, which is assigned before its maturity, he will not be indebted to such defendant, but to the holder, and will not be liable to garnishee process in the attachment. *Warne et al.* v. *Kendall*, 598.

OF THE ISSUES TO BE FORMED.

7. *Between whom.* It is irregular to make up and try an issue between a garnishee and the attaching creditor. The issue should be between the defendant in attachment and the garnishee. Ibid. 598.

OF THE JUDGMENT.

8. No judgment can be rendered against a garnishee in favor of the attaching creditor, but it must be in favor of the defendant in attachment, which will stand as a security or fund, in which other attaching creditors may participate. Ibid. 598.

GUARDIAN AND WARD.

GUARDIAN'S SALE OF REAL ESTATE.

1. *Nature of the proceeding.* Proceedings by a guardian to sell real estate for the maintenance of the ward is a proceeding purely *in rem.* No parties are necessary. It is *ex parte*, in the name of the guardian, on behalf of the ward, after notice to all concerned. In this particular, it differs from proceedings to sell real estate to pay debts, where the heirs are necessary parties. *Mulford et al.* v. *Beveridge et al.* 455.

2. *Report by guardian.* It is the duty of a guardian making sale of real estate of his ward, to report his proceedings to the court granting the order, but as to what portion of the proceedings, or at what stage of the case the report is to be made, the statute is silent. Ibid. 455.

3. *When title passes—delivery of deed.* Where the decree of the court authorizing a guardian to sell real estate of his ward directed him to report such sale to the court for approval and confirmation before the same should be completed, and a sale was made, reported and approved, and, subsequent to such approval, a deed was executed by the guardian, to be delivered to the purchaser upon his securing

GUARDIAN AND WARD.

GUARDIAN'S SALE OF REAL ESTATE. *Continued.*

the purchase money as required by the decree, the interest of the ward was thereby vested in such purchaser, subject to be divested in case of non-payment or refusal to secure the purchase money as required by the decree. *Mulford et al.* v. *Beveridge et al.* 455.

4. *Actual delivery of deed to purchaser, under certain circumstances, not essential to pass title.* In this case, a guardian sold land, and executed a deed to be delivered to the purchaser upon his securing the purchase money, in accordance with the decree. The purchaser failed to do so, but, by an arrangement between the guardian and the purchaser, the latter conveyed the land to a third party, by deed, absolute on its face, but to be held by such third party and re-sold by him, and, afterwards, he did re-sell it for more than the amount bid by the purchaser at the guardian's sale, and the proceeds were accounted for to the guardian: *Held*, that, under these circumstances, it was not material whether the deed from the guardian to the purchaser at the guardian's sale was ever in the actual possession of such purchaser or not. What occurred was equivalent to a delivery, and the title acquired under these circumstances was valid. Ibid. 455.

5. The conveyance to the third party did not vest the title in him to hold permanently for the benefit of the wards, as trust property, but was in the nature of a mortgage to secure the purchase money for which the property had been sold at the guardian's sale, and he could re-sell it for that purpose without any further order of the court. Ibid. 455.

6. *Not affected by irregularities after the decree of sale and the subsequent management of the funds.* Where the court has jurisdiction, and makes an order of sale, the fact that the guardian may proceed irregularly in the execution of the order, will not make the sale invalid. Ibid. 455.

7. The purchaser at a guardian's sale is not bound to see to the application of the funds, nor that the guardian renders a true account of his guardianship, and a failure on the part of the guardian in this respect can not vitiate the sale. Ibid. 455.

HANDWRITING.

PROOF THEREOF. See EVIDENCE, 7, 8.

HEIRS.

PROOF OF HEIRSHIP.

1. *Whether sufficient.* Where a party, owning real estate, died without issue, and it appeared that he originally came from a certain locality in Ireland, and that he had frequently spoken, amongst his

HEIRS. PROOF OF HEIRSHIP. *Continued.*

friends, of his father and brothers, half brothers and a sister, naming some of them, still residing where he came from, and parties claiming to be heirs of the deceased proved that their father lived in the same locality; that it was common report in their family that they had an uncle in America of the same name of deceased; that their father had brothers and half brothers and a sister, and that the names of their father and his brothers, half brothers and sister corresponded with the names of those of deceased, so far as he had given their names, and that the name of their paternal grandfather corresponded with the name of the father of deceased, as given by himself; and it further appearing that the claimants were the sole surviving descendants of their father, and that all of his brothers, sisters and half brothers were dead, and had no descendants surviving: *Held*, this was sufficiently satisfactory evidence of the heirship of the claimants. *Cuddy* v. *Brown et al.* 415.

REMEDY AGAINST ESTATE OF DECEASED ADMINISTRATOR.

2. *For money not paid over.* See ADMINISTRATION OF ESTATES, 8.

HIGHWAYS.

DEFECTIVE SIDEWALKS AND STREETS.

1. *Duty and liability in respect to them.* A city is not required to have its sidewalks so constructed as to secure immunity from danger in using them; nor is it bound to employ the utmost care and exertion to that end. Its duty, under the law, is only to see that its sidewalks are reasonably safe for persons exercising ordinary care and caution. *City of Chicago* v. *McGiven*, 347.

2. The mere slipperiness of a sidewalk, occasioned by ice or snow, not being accumulated so as to constitute an obstruction, is not such a defect as will make the city liable for damages occasioned thereby. Ibid. 347.

3. *Contributory negligence by careless driving.* In a suit against a city for damages occasioned by reason of a defect in the street, whereby plaintiff was thrown from a wagon and injured, it appeared that the driver of the wagon in which plaintiff was, was drunk, and drove so carelessly as to cause the accident, and that the defect in the street was not such as to be dangerous to a person exercising ordinary care, it was *held*, that a verdict for near $4000, against the city, should have been set aside. *City of Rock Island* v. *Vanlandschoot*, 485.

HOMESTEAD.

EXTENT OF EXEMPTION.

1. *Excess over* $1000. *subject to execution.* Where the land occupied by a defendant in execution is worth more than $1000, he is not entitled to have the whole of it set off to him. *Newman* v. *Willitts*, 397.

HOMESTEAD. EXTENT OF EXEMPTION. *Continued.*

2. Where 40 acres of land were levied on under execution, and claimed by the defendant as exempt, and the sheriff summoned six householders, who set off a portion of the same, including the dwelling house, out houses, barn, spring and garden, worth fully $1000, in conformity to the provisions of the statute, this was all the defendant was entitled to, and the sheriff was authorized to sell the residue of the land under the execution. *Newman* v. *Willitts*, 397

IN WHAT MANNER SET OFF.

3. *To defendant in execution.* An execution was levied on land occupied by defendant as a homestead, and the officer made return to that effect, and also returned the affidavit of six persons, naming them, in which they described themselves as householders and residents of the county where the land was situated, and stated that they had been summoned by the sheriff to appraise and set off the homestead of the defendant in the execution in and upon the land, and taken the oath required in such cases. These persons set off to defendant in execution a portion of the land, embracing the dwelling house, barn, orchard, garden, etc., worth fully $1000: *Held*, that the homestead was set off in conformity with the statute. Ibid. 397.

4. *On decree of foreclosure of mortgage.* The statute not having, in terms, pointed out the particular manner in which a court of chancery shall proceed to set off a homestead, where it becomes necessary to enforce a lien in equity on the premises, it is proper to adopt the mode provided by the statute when an officer holds an execution. *Cummings et al.* v. *Burleson et al.* 281.

5. It is proper in a decree of sale upon foreclosure of a mortgage, to direct the master in chancery "to proceed, according to law, to summon three householders, as commissioners, who shall, upon oath, administered to them by such master, appraise the value of the premises in which homestead is claimed, and if the premises can, in their opinion, be divided without injury to the interests of the parties, to set off so much thereof, including the dwelling house, as shall be worth $1000, and that the master sell the residue of said premises." Ibid. 281.

6. In summoning such commissioners, the master acts as an officer of the court, for and on behalf of all the parties to the proceeding, and need not consult the owner of the premises in selecting such commissioners. Ibid. 281.

HUSBAND AND WIFE.

GOODS SOLD TO THE WIFE.

1. *Liability of husband.* Where goods necessary and suitable to the position in life of a wife are sold to her, on the credit of her husband, and charged to him, a jury will be justified in finding that the wife was the agent of the husband to make the purchase. *Gotts* v. *Clark*, 229.

IMPLIED COVENANTS.

As between landlord and tenant. See LANDLORD AND TENANT, 1.

INFANTS.

Goods sold to minor child.

Liability of the father. See PARENT AND CHILD, 1, 2, 3.

INJUNCTIONS.

Of the power to award injunctions.

1. *Generally.* To the complete authority of a court to award an injunction, it is necessary that there shall be a complainant, who must file a bill, alleging facts, showing that he has an interest in the matter in litigation, or at least a right to complain and have relief for others. There must be a matter about which rights are claimed, and that matter must be within the power of the court, when properly before it, to act upon or control it, by its sentence; and if any or either of these essential requirements are wanting, the court can not decree that a restraining order shall issue. *Dickey et al.* v. *Reed et al.* 261.

2. Whilst the writ of injunction is one of the most important in the law, and is, in fact, indispensable to the complete administration of justice, it is liable to great abuse, and it would not be wise, nor would it promote justice, to extend its use to cases of doubtful right, or to accomplish ends where there are other adequate remedies. Ibid. 261.

Whether injunctions will lie.

3. *To restrain persons from exercising the functions of an office.* Equity will not interfere, by injunction, to restrain persons from exercising the functions of public offices, on the ground of the want of binding force in the law under which their appointments were made, but will leave that question to be determined at law. *Sheridan et al.* v. *Colvin et al.* 237.

4. In this case, it was sought to enjoin the city council of a city from enforcing an ordinance, on the sole ground that, if the ordinance was enforced, it would deprive the complainants of the functions of offices which they held in the city: *Held*, that a court of chancery had no jurisdiction. Ibid. 237.

5. *To restrain a city from doing certain acts.* A court of equity will not restrain a city and its officers from performing an act which is illegal and unwarranted by law, on the ground that it will necessitate a levy of heavy taxes or special assessments, as the party complaining has an ample remedy at law. In such a case, the tax or

INJUNCTIONS. WHETHER INJUNCTIONS WILL LIE. *Continued.*

assessment will be illegal and void, and its payment can be resisted at law. *Brush* v. *City of Carbondale*, 74.

6. *To restrain board of canvassers from canvassing returns of election.* A court of chancery has no power to restrain, by injunction, a board of canvassers from canvassing the returns of an election, where the law under which the election was held, neither in terms nor by implication confers such power, and where there are no facts before the court which require it to take judicial cognizance, and hear, adjudicate and decree. *Dickey et al.* v. *Reed et al.* 261.

WHO ENTITLED TO INJUNCTION.

7. *To prevent improving land as a street, complainant must show title.* To entitle a party to a perpetual injunction to restrain the grading and improving of land as a street, he must show that he is the owner of such land; proof, merely, that he is in possession will not be sufficient. *Gleason* v. *Village of Jefferson et al.* 399.

WHEN ISSUED WITHOUT AUTHORITY.

8. *The writ is void, and need not be obeyed.* A writ of injunction, issued in a matter where the court could not, under any circumstances, have power to hear, determine and decree in reference to such matter, is *coram non judice*, and void. *Dickey et al.* v. *Reed et al.* 261.

9. Where a writ of injunction is issued by a court which has power over the subject matter, and authority to take jurisdiction, it must be obeyed; but where the power of the court is wholly wanting, the writ is void, and can legally operate on no one, nor can any one be punished for contempt for disobeying it. Ibid. 261.

INJUNCTION BOND.

10. *Undertaking of surety strictly construed.* The undertaking of a surety on an injunction bond must be strictly construed, and he can not be held liable beyond the precise terms of his undertaking. *Ovington* v. *Smith et al.* 250.

11. *Character and extent of liability in a particular case.* An injunction bond was given to two parties, who were enjoined, and the condition was, that the obligors should pay to said two parties all damages that might be awarded against the complainant on the dissolution of the injunction, and the injunction was dissolved as to one of the defendants, and damages assessed in his favor against the complainant. In a suit brought on the injunction bond against the surety, to recover the amount of the damages so assessed, it was *held*, he was not liable, his undertaking being to pay to the two parties damages upon the dissolution of the injunction as to both of them, and not to one upon the dissolution of the injunction as to him alone. Ibid. 250.

INJUNCTIONS. *Continued.*

DAMAGES ON DISSOLUTION.

12. *Cost of advertising and attorney's fee.* Where the sale of premises by a master in chancery was enjoined, it was proper, in assessing damages on the dissolution of the injunction, to include the costs of advertising the sale, and a reasonable solicitor's fee for defending the injunction suit. *Cummings et al.* v. *Burleson et al.* 281.

13. *Reasonableness of solicitor's fee on dissolution.* Where a temporary injunction is dissolved, and the bill dismissed on motion, the case involving simply the construction of a statute, the allowance of $200 for solicitor's fees, in the assessment of damages, will be regarded as too large. *Spring et al.* v. *Collector of City of Olney*, 101.

14. *Preserving evidence on assessment of damages on dissolving injunction.* If the evidence heard upon the assessment of damages, upon dissolution of an injunction, is not preserved in the record, the decree will be reversed. It is not sufficient for the decree to recite that evidence was heard, without showing what facts were proved. Ibid. 101.

INSANE PERSONS.

IN WHOSE NAME TO SUE.

1. Until the appointment and qualification of a conservator for an insane person, it is clear that suit may be brought in such insane person's name for the recovery of a debt due him. *Chicago and Pacific Railroad Co.* v. *Munger*, 300.

2. A plea in abatement that, before and at the time of the commencement of the suit, the plaintiff was, and still is, an insane person, etc., is bad on demurrer. Ibid. 300.

INSTRUCTIONS.

OF THEIR REQUISITES.

1. *Should be based upon evidence.* In an action against a surgeon for malpractice, where there is no evidence tending to prove wilful negligence, it is error to instruct the jury that they may find for the plaintiff in any amount they deem proper, under the evidence, if they believe, from the evidence, that the defendant was wilfully negligent. *Wenger* v. *Calder*, 275.

2. It is error to give an instruction upon a given state of facts susceptible of definite proof, where there is no evidence tending to prove the same. *Board of Trustees* v. *Misenheimer et al.* 22; *Nichols* v. *Bradsby*, 44.

3. It is not error to refuse an instruction when there is no evidence in the case upon which it can be predicated. *Plummer* v. *Rigdon*, 222.

INSTRUCTIONS. Of their requisites.

4. The want of evidence upon which to base an instruction is sufficient to justify its refusal. The evidence should be fairly sufficient to raise the question involved in the instruction. *Straus et al.* v. *Minzesheimer*, 492.

5. *Should not assume disputed fact.* An instruction which assumes the existence of a material disputed fact, is properly refused. Ibid. 492.

6. It is error to instruct the jury that if they believe, from the evidence of a particular witness, that all his knowledge of a fact testified about by him is derived from the books of the party calling him, and if they find that the testimony of such witness is all the evidence on that subject, then there is no evidence before them as to that fact. *Wolcott et al.* v. *Heath*, 433.

7. *May be based upon the issues formed.* It is not error to give an instruction involving the issue made by the pleadings. If the cause of action charged in the declaration is not well pleaded, the defendant's proper course is to demur. *Miller* v. *Balthasser*, 302.

8. *Jury to found their belief on the evidence.* Whilst it would be error to so instruct the jury that they could find a verdict upon their belief, not based upon the evidence, yet it is not necessary to repeat in each clause of an instruction that the jury must believe from the evidence. It is sufficient if, in the first clause of the instruction, they are told that their belief must be founded upon the evidence, and there is nothing in the subsequent part from which sensible men could infer that they had a right to find a verdict upon any belief outside of the evidence. Ibid. 302.

9. Where the plaintiff testified that defendant had committed an assault upon her, and the defendant, in his testimony, denied it, and there was no other testimony on the subject, the verdict of the jury necessarily depended upon the degree of credit to be given to one or the other, and it was not error to instruct the jury that if they believed, from the evidence, that the defendant assaulted the plaintiff, as testified to by her, that would warrant them in finding the defendant guilty. Ibid. 302.

INSURANCE.

Life insurance.

1. *May be made payable so as to exclude creditors.* It is competent, under the laws of this State, to make a policy of insurance on a person's life payable to his widow or heirs, to the exclusion of his creditors. *The People, use. etc.* v. *Phelps, Admx.* 147.

2. But when payable to the "legal representatives" of the assured, the proceeds will be assets in the hands of his executor or administrator for the payment of debts. Ibid. 147.

INSURANCE. *Continued.*

PREMISES BECOMING VACANT.

3. *Contrary to a condition in the policy.* A condition, in a policy of insurance of a dwelling house, that, if the house should become vacant and unoccupied, the policy should become void, is broken when the tenant occupying the same leaves the house two months before a loss by fire, and gives the assured notice of the fact, and no recovery can be had on the policy for the loss. The fact that the tenant has left a few articles in the building, and has not delivered the key to the owner, but with no intention of thereby holding possession, will not change the rule. *American Insurance Company* v. *Padfield et al.* 167.

INTEREST.

WHEN RECOVERABLE.

1. *On money payable in installments.* Where, by the terms of a written contract, payments become due on a certain day in each month, it is proper to allow interest on such sum as may be due on the specified day, from that time until paid. *Dobbins et al.* v. *Higgins et al.* 440.

PAYMENT OF INTEREST "TO" A DAY.

2. *Construction.* An indorsement of the payment of interest on a promissory note to the 26th day of July, 1871, will not embrace the interest accruing on that day, but will be understood as including the interest for the time which was completed when that day commenced. *Stearns et al.* v. *Sweet et al.* 446.

INTOXICATING LIQUORS.

OF THE COMPLAINT.

1. *For violation of ordinance.* In a prosecution under an ordinance for selling intoxicating liquors, a complaint, under oath, that the defendant, as the prosecutor is informed and believes, has committed an offense, by violating the provisions of a certain section of an ordinance, which is given, by selling intoxicating liquors in the city, not having a legal license to keep a grocery, is substantially good. *Byars* v. *City of Mt. Vernon*, 11.

STATUTE TO BE STRICTLY CONSTRUED.

2. The statute of 1874, relating to dram shops and intoxicating liquors, is a penal statute in its provisions, and is to be construed strictly, keeping in view the great central object in its enactment, and the evils to be prevented. *Albrecht* v. *The People*, 510.

ACT OF 1874, ENTITLED "DRAM SHOPS."

3. *Does not extend to acts of mere private hospitality.* Every section of the statute of 1874, the title of which is "Dram Shops," is aimed at such as keep a dram shop, not, however, with a view to their suppression; and the provisions of the sixth section do not apply to a

INTOXICATING LIQUORS.

ACT OF 1874, ENTITLED "DRAM SHOPS." *Continued.*

person who treats a friend at his private house, as an act of hospitality. *Albrecht* v. *The People*, 510.

4. In this case, the defendant was a brewer, engaged in the manufacture of beer, not to be sold and drank on the premises, but for sale by the quantity, and being unwell, and confined to his house, on some persons calling to see him on business, he sent for a pitcher of beer, and invited all to drink, and one of the parties did drink, whom it was alleged was intoxicated: *Held*, that the case was not the one contemplated by the sixth section of the act of 1874, and no conviction could rightfully be had against him. Ibid. 510.

JUDGMENTS.

JUDGMENT IN ANOTHER STATE.

1. *How authenticated.* Where a transcript of a judgment in a court of another State is certified by the clerk of the court, and the presiding judge certifies that the attestation is in due form, it is a substantial compliance with the act of Congress of May 26, 1790. *Horner* v. *Spelman et al.* 206.

ENTERING JUDGMENT NUNC PRO TUNC.

2. The entry of a judgment *nunc pro tunc* is proper when a judgment had been ordered at the proper term, but the clerk has failed or neglected to enter it upon the record. *Howell et al.* v. *Morlan*, 162.

CONFESSION OF JUDGMENT.

3. *Under warrant of attorney.* The authority to confess a judgment without process must be clear and explicit, and must be strictly pursued. *Frye et al.* v. *Jones et al.* 627.

4. A warrant of attorney, which authorizes the confession of judgment upon a note therein described, and also upon other indebtedness to be afterwards incurred by the maker of such note to the payee thereof, upon other notes made or to be made, will not authorize the confession of a judgment upon other notes payable to the same payee, and bearing the same date of the note particularly described in such warrant of attorney. Ibid. 627.

5. In this case, there were thirteen notes, all of the same date, executed by the defendant and payable to the plaintiff, to six of which were annexed warrants of attorney, each authorizing a confession of judgment for the amount of the note to which it was annexed, and also for any further indebtedness of the defendant which might thereafter accrue to the defendant upon any note, bond, etc., made or to be made. The attorney named in the six warrants of attorney confessed a judgment for the amount of all the thirteen notes: *Held*, that it was error to refuse to set aside so much of said judgment as

JUDGMENTS. CONFESSION OF JUDGMENT. *Continued.*

included the amount due upon the notes to which no warrant of attorney was attached. *Frye et al.* v. *Jones et al.* 627.

6. In a suit against two, where there is service on one, only, and the appearance of the other is entered under a power of attorney authorizing the attorney to enter appearance, waive service and confess a judgment, the court has jurisdiction and can proceed to judgment. *Stewart* v. *The Hibernian Banking Association*, 596.

7. In such case, the fact that the attorney only enters the appearance and waives service, without confessing judgment, but allows a jury to hear evidence and return a verdict, is not such a departure from the authority conferred by the power, as will render all the acts done under it erroneous. Ibid. 596.

SETTING ASIDE JUDGMENT AT SUBSEQUENT TERM.*

8. A motion to set aside a judgment can not be made after the term at which it was rendered. *Coursen* v. *Hixon*, 339.

9. *The statute* giving to a motion the same efficacy as a writ of error *coram nobis*, does not affect this rule, the only object of that statute being to dispense with this old writ. Ibid. 339.

IN GARNISHEE PROCEEDINGS.

10. *Of the proper judgment.* See GARNISHMENT, 8.

IN CRIMINAL CASES.

11. *Of a several judgment on different counts.* See CRIMINAL LAW, 7.

JUDICIAL AND LEGISLATIVE POWER.

JUDICIAL POWER.

1. *As distinguished from political power—in respect to elections, and the mode of contesting the same.* It was not designed, when the fundamental law of the State was framed, that either department of government should interfere with or control the other, and it is for the political power of the State, within the limits of the constitution, to provide the manner in which elections shall be held, and how they shall be contested, and the courts can not interfere. *Dickey et al.* v. *Reed et al.* 261.

2. The political power of the State may organize municipal bodies, and put them into operation by force of enactment, or by election by the people to be thus governed, and may provide the mode of reviewing the returns of all elections, to ascertain whether they are in accordance with the expressed will of the people, and until the courts are empowered to act, by the constitution or by legislative enactment, they must refrain from interference. Ibid. 261.

*See *National Ins. Co.* v. *Chamber of Commerce*, 69 Ill. 22.

JUDICIAL AND LEGISLATIVE POWER. *Continued.*

DELEGATION OF LEGISLATIVE POWER.

3. *To whom.* The legislative power is vested by the constitution in the General Assembly, and ordinarily it can not be delegated. The right, however, of the legislature to empower municipal corporations to make by-laws and ordinances for the welfare and government of the inhabitants of the corporation, can not be denied. *Tugman* v. *City of Chicago*, 405.

4. Where such power is conferred upon a municipal corporation, it is exercised by a body elected by the people to be affected; but if the legislature possess the power to delegate legislative authority to a body to be appointed by some judicial officer of the State, the people of the corporation might be deprived of self-government; they would be governed by a body they had no voice in electing, which is repugnant to our theory of government. Ibid. 405.

JUDICIAL SALES. See SALES, 14, 15.

JURISDICTION.

SENDING PROCESS TO FOREIGN COUNTY.

1. *On scire facias to revive a judgment.* A *scire facias* to revive a judgment is not a suit, within the meaning of the statute prohibiting a plaintiff from suing a defendant out of the county where the latter resides or may be found, but is a judicial writ, founded on a matter of record, and must be issued from the court in which the judgment was rendered. *Challenor* v. *Niles, Admr.* 78.

2. In *scire facias* to revive a judgment, or upon a matter of record, the court has jurisdiction to send its process to any county where the defendant may be found, and a plea in abatement, that the defendant does not reside, etc., in such county, is not sustainable. Ibid. 78.

IN ATTACHMENT PROCEEDINGS.

3. *Service or levy essential to jurisdiction.* See ATTACHMENT, 1.

AWARDING EXECUTION ON DECREE.

4. *At a term subsequent to that at which a final decree was entered.* See CHANCERY, 29.

JURISDICTION OF THE PERSON.

5. *Entry of appearance under power of attorney.* See JUDGMENTS, 6, 7.

NATURALIZATION.

6. *Jurisdiction of county courts.* See NATURALIZATION, 1, 2.

JURY.

COMPETENCY.

1. *Of a bias in respect to the subject matter of an indictment.* It is not ground of challenge, on the trial of one indicted for keeping open

JURY. COMPETENCY. *Continued.*

a tippling house on the Sabbath day, that a juror has a bias or feeling against persons engaged in the business of saloon keeping, and a prejudice against the selling of liquors, when he states that such feeling and prejudice would not influence his judgment, and that his feeling and prejudice was against the business, and not against the persons engaged in it, and that he would do the defendant justice. ***Kroer*** v. *The People*, 294.

GRAND JURY.

2. *Mode of obtaining.* The act of April 10, 1872, providing for the clerk of the court to draw from the jury box kept in the county clerk's office, for the purpose of obtaining grand jurors, was repealed by the act of May 7th, 1873, which provides that the county board of the county shall select the grand jury. *Empson* v. *The People*, 248.

3. Under the statute of 1873, where the grand jurors regularly summoned have been discharged, the court may order a special venire for a grand jury, and this is the only mode to obtain one under such circumstances, unless it was summoned from the bystanders. Ibid. 248.

PERPETUAL EXEMPTION FROM SERVICE.

4. *Power of the legislature.* The legislature has not the power to exempt a person perpetually from serving on juries, in consideration of services rendered as a member of a fire company; but such exemptions are subject to repeal by any succeeding legislature. ***Bragg*** v. *The People*, 328.

JUSTICES OF THE PEACE.

AS TO THE HOUR APPOINTED FOR TRIAL.

1. Under the practice which has existed for many years in justices' courts, it is the duty of the justice to hold the case open one hour after the time named in the summons for a defendant to appear, but he is not required to wait longer before rendering judgment. At the expiration of the hour, it is his duty to call and dispose of the case, and the presumption is, that he does so. ***First National Bank of Chicago*** v. *Beresford*, 391.

MODE OF PRESENTING ISSUES.

2. *Forms not regarded.* In proceedings before a justice of the peace, appellate courts will only look at substance, and disregard forms. *Zuel* v. *Bowen*, 234.

DENYING EXECUTION OF NOTE.

3. *Of the mode thereof.* In a suit before a justice of the peace, against two parties as partners, upon a note signed by the firm name of such partnership, no plea is necessary to put in issue either the execution of the note or the fact of partnership, but an affidavit presenting the issue is sufficient. Ibid. 234.

JUSTICES OF THE PEACE.

DENYING EXECUTION OF NOTE. *Continued.*

4. Where a suit was brought before a justice of the peace, against two parties as partners, upon a note signed by the firm name, and one of the parties filed a plea "that he neither signed, nor authorized, or consented to the execution of the note," verified by his affidavit: *Held*, that, on the trial of the case in the circuit court, it was error to permit the note to be read in evidence, without proof of its execution being first made. *Zuel* v. *Bowen*, 234.

CONSOLIDATION OF DEMANDS.

5. If a plaintiff has a demand for a reward offered, and the defendant gives his note for $66.66, part of the same, and the plaintiff sues for the balance of the reward without including his note, and recovers only $33.33, this will be a bar to any subsequent suit upon the note. *Mallock* v. *Krome*, 110.

LANDLORD AND TENANT.

IMPLIED COVENANTS.

1. *In favor of tenant.* The law will imply covenants for quiet possession, and enjoyment against paramount title, and against such acts of the landlord as destroy the beneficial enjoyment of the lease. *Berrington* v. *Casey*, 317.

REMEDY OF TENANT.

2. *For breach of implied covenant for possession by landlord.* Where the landlord leases premises to a tenant by a parol lease, and afterwards, and before the tenant gets possession, leases the same premises to another, and puts him in possession, the first tenant may either bring an action of ejectment and recover the possession, or he may sue in assumpsit for the breach of the implied covenant for possession and quiet enjoyment. Ibid. 317.

3. *Offer to pay rent.* And in such case the tenant is not required to offer to pay the rent as it would accrue under his lease, after the breach of contract by the landlord, to entitle him to maintain his suit for such breach. Ibid. 317.

PAYMENT OF RENT BY IMPROVEMENTS.

4. *Effect of breach of contract by tenant.* Where land is leased to a tenant for a term of years, in consideration of specified improvements to be made by him, a failure on his part to make such improvements will not, of itself, work a forfeiture of the lease, and convert him into a tenant liable to pay for the use and occupation. *Raybourn* v. *Ramsdell*, 622.

5. Until steps are taken to terminate such a lease, the lessee will be held to occupy under the lease, and his liability measured thereby. Ibid. 622.

LAW AND FACT.

ON QUESTION OF POSSESSION.

1. *Delivery and change of possession on sale.* If there is evidence tending to prove a delivery and change of possession of goods on a sale before the levy of an attachment, it is a question of fact for the jury to determine whether there was a delivery and change of possession, and not a mixed question of law and fact. *Straus et al.* v. *Minzesheimer et al.* 492.

LEGISLATIVE POWER. See JUDICIAL AND LEGISLATIVE POWER.

LEX LOCI. See CONTRACTS, 5 to 8.

LICENSE.

LICENSING HACKMEN, TEAMSTERS,* ETC.

1. An ordinance that "there shall be levied upon every hackman, drayman, omnibus driver, carter, teamster, cabman or expressman, and all others pursuing a like occupation, the sum of ten dollars for a license," was *held* not to embrace a farmer driving his team through the city. The purpose and object of such an ordinance is to impose a tax upon a business, calling or occupation, and not upon one who may occasionally haul a few loads, in an emergency, for another, when that is not his calling. *City of Collinsville* v. *Cole*, 114.

LIENS.

LIEN AGAINST RAILROADS

1. *For what character of indebtedness.* The lien given by statute against the property of a railway company is only for materials used, supplies furnished, and for labor performed in constructing, repairing, operating or maintaining the road. The loan of money, or the payment of its creditors, is not embraced in the statute giving the lien. *Cairo and Vincennes Railroad Co.* v. *Fackney*, 116.

2. A party who, at the request of a railway company, takes up its certificates of indebtedness given to its laborers and others for the boarding of hands, is not entitled to any lien, under the statute, against the company or its property. Ibid. 116.

LANDLORD'S LIEN.

3. *Not dependent upon a distress.* A landlord's lien upon crops growing or grown upon the demised premises in any year, for rent that shall accrue for such year, does not depend upon the levy of a distress warrant, but is given by the statute, so that an attaching cred-

*See *Joyce* v. *City of East St. Louis*, 77 Ill. 156.

LIENS. LANDLORD'S LIEN. *Continued.*

itor can not, by bringing an attachment before the issuing of the distress warrant, gain any precedence. *Mead* v. *Thompson*, 62.

MECHANIC'S LIEN.

4. *Where the owner has given his note, which is not produced.* The fact that a party, seeking to enforce a mechanic's lien, took the note of the person for whom the work was done, for the work, and traded it off, and the note was not produced on the trial, and offered to be surrendered, nor any excuse shown for its non-production, would warrant a judgment for the defendant. *Clement* v. *Newton et al.* 427.

5. Where the petitioner, in a proceeding to enforce a mechanic's lien, testified that he had taken a note for his work, and traded it to a third party, a motion made to set aside a judgment rendered in favor of the defendant, based upon the affidavit of such third party that he had never received such note from the petitioner, and that he held the beneficial interest in the claim in suit, the attorney of said third party having, on the trial, testified to the same fact, was properly overruled. Ibid. 427.

6. *Does not lie against school property.** The lien given by statute to a mechanic or material-man, for labor or materials furnished in the erection of a building, does not attach against property held for public school purposes. *Board of Education* v. *Neidenberger et al.* 58.

WHETHER LIEN ASSIGNABLE.

7. Although a laborer upon a railroad has a lien by statute for the sum due him, it is not assignable at law, and, even if assignable, it would not entitle the holder of the same to assign the lien. *Cairo and Vincennes Railroad Co.* v. *Fackney*, 116.

REMEDY FOR ENFORCEMENT OF LIENS.

8. *In equity.* Liens are enforceable in equity unless the law has provided another mode. This is true of vendor's liens, equitable and other mortgages, and all statutory liens, except when the lien is in the nature of a pledge, and possession accompanies the lien. A court of law does not possess the means of enforcing such liens. Ibid. 116.

LIMITATIONS.

LIMITATION ACT OF 1839.

1. *What constitutes color of title.* A sheriff's deed for land sold for taxes is color of title under the limitation law of 1839, but the contract for sale of land is not, of itself, color of title. ***Hardin* v. *Crate*, 533.**

*See, also, *Thomas* v. *Board of Education*, 71 Ill. 283

LIMITATIONS. LIMITATION ACT OF 1839. *Continued.*

2. *Payment of taxes—by whom, to be availing.* If a party acquires color of title in bad faith, and makes a contract to sell the land to another, who pays taxes on the same before the vendor parts with his color by a conveyance, such payments will be unavailing to the purchaser, under the limitation law of 1839. *Hardin* v. *Crate*, 533.

3. But if the color of title was acquired in good faith by the vendor, then the payment of taxes by a purchaser from the original owner of the color of title, under a contract, will be good under the statute, and will enure to the benefit of such purchaser when he afterward acquires the color of title. Ibid. 533.

THE STATUTE MUST BE SPECIALLY PLEADED.

4. No rule of practice is more firmly settled, than that, to render the Statute of Limitations availing as a defense, it must be set up and relied on by the pleadings; and this rule applies equally in equity and at law. *Borders et al.* v. *Murphy*, 81.

LOST RECORDS.

TRANSCRIPT FROM JUSTICE'S DOCKET.

Lost from files of circuit court—in what manner restored. See CHANCERY, 3.

MANDAMUS.

WHEN MANDAMUS THE PROPER REMEDY.

1. *As to matters of discretion.* Where a discretion is abused, and made to work injustice, it may be controlled by *mandamus*. *Council of the Village of Glencoe* v. *The People ex rel. Owen*, 382.

2. *To compel municipal authorities to provide for holding an election.* Where a proper petition is presented to the council of a village incorporated under a special act or charter, praying for an election to vote upon the question of organizing under the general incorporation law, the council have no discretion to refuse to call the election, but should act upon the same at the earliest convenient moment, and appoint judges to hold the election, and give notice of the time and place of holding the same. If the council should unreasonably postpone the time for holding the election, and fail to appoint judges to hold it, or neglect to give the proper notice, the courts will compel them to do their duty in this respect by *mandamus*. Ibid. 382.

WHO MAY PROSECUTE.

3. Where the object of a proceeding by *mandamus* is the enforcement of a duty in which the public is interested, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. It is enough that he is interested as a citizen in having the laws executed, and the right in question enforced. Ibid. 382.

MANDAMUS. *Continued.*

TO COMPEL APPROVAL OF OFFICIAL BOND.

4. *Requisites of petition and order.* Where an officer, required by law to execute a bond to be presented to and approved by another officer, before entering upon the duties of his office, presents two different bonds, at two different times, for approval, and both are refused, and he applies for a *mandamus* to compel approval, the petition and the order for the writ should both designate the particular bond to be approved. *Ross* v. *The People ex rel. Johnson*, 375.

OF THE SUMMONS—TO WHOM DIRECTED.

5. *In a proceeding against the municipal government of a village.* Where the municipal government of a village is vested in a council, consisting of a president and five councilmen, a summons in a proceeding for a *mandamus* to enforce a public duty against "the council" of the village, will be good, and it need not be directed to "the president and councilmen" of the village. *Council of the Village of Glencoe* v. *The People ex rel. Owen*, 382.

SERVICE OF SUMMONS—UPON WHOM.

6. A summons in a suit against the council of a village, in a proceeding to obtain a *mandamus* to compel the performance of a public duty, is properly served upon the president alone. Ibid. 382.

SERVICE OF THE PEREMPTORY WRIT.

7. *Upon whom.* But a peremptory writ of *mandamus* against a municipal corporation is governed by different principles, and must be served upon those persons composing the council at the time of service. Ibid. 382.

MARRIED WOMEN.

LIABILITY ON THEIR CONTRACTS.

1. *Estoppel to deny ownership.* If a married woman is in the possession of property, claiming to own and controlling the same, and, on her declaration of ownership, employs a party to make improvements on the same, under the belief that it is her separate property, she will be estopped from denying that she owned the same, when sued for the value of the labor performed. *Nixon* v. *Halley*, 611.

2. It is sufficient, to make a married woman liable, that she is in possession of real property, claiming to own the same in her own right, and, as such, employs another to perform labor upon the same. In such a case, it is wholly immaterial whether she has any title to the same or not. Ibid. 611.

REMEDIES AGAINST THEM.

3. *On contracts—when at law.* The liability of a married woman for services rendered at her request, in relation to her separate property, is at law, and not in equity. *Furness et al.* v. *McGovern et al.* 387.

MARRIED WOMEN. Remedies against them. *Continued.*

4. *In equity—to enforce charge on their separate property.* There must be a positive intention manifested by some appropriate instrument in writing, or otherwise, to make the debt or claim a specific charge upon the separate property of a married woman, before equity will assume jurisdiction to enforce it. *Furness et al.* v. *McGovern et al.* 337.

Use of separate property by husband.

5. *Effect upon rights of the wife.* The fact that a married woman allows her husband to have a general use and control over her personal property, such use and control being of a character consistent with their common interests, and the proper enjoyment of it by both, will not make it liable for his debts, or entitle his administrator to claim the same as against her mortgagee. *Primmer* v. *Clabaugh*, 94.

MASTER AND SERVANT.

Duty of salesman in a store.

1. *Should be respectful and obedient.* Where a party is employed by another, he must, in his intercourse with his employer, and those having control of his business, and with those doing business with such employer, abstain from all vulgarity and obscenity of language and conduct, and must be respectful and obedient to all reasonable commands of his employer, and those having control of his business. *Hamlin, Hale & Co.* v. *Race*, 422.

2. A failure in any of these requirements by a salesman in a store, would be ground for discharging him before his term of employment expires. Ibid. 422.

MEASURE OF DAMAGES.

For failure to convey land.

1. In an action by a purchaser of land to recover damages for a failure to convey, the value of the land at the time the conveyance is to be made, is the true measure of damages. *Plummer* v. *Rigdon*, 222.

On an agreement to exchange lands.

2. So in case of an agreement to exchange lands, and one of the parties knew at the time that he had no title to the land which he agreed to convey, in an action against him by the other party to recover damages for a failure to convey, the extent of the recovery should be measured by the value of the land to be conveyed to the plaintiff, and for the reason that the defendant sold land which, at the time he made the contract, he knew he did not own. Ibid. 222.

In action for malpractice.

3. In a suit against a surgeon for malpractice in treating an injury, the plaintiff is not entitled to recover anything on account of pain

MEASURE OF DAMAGES. IN ACTION FOR MALPRACTICE. *Continued.*

and suffering caused by the injury, but only for such additional pain and suffering as is produced by the negligence or want of skill of the defendant in the treatment. *Wenger* v. *Calder*, 275.

FOR WORK AND LABOR.

4. *As affected by subsequent agreement.* Where a person employed to lay the brick in a building at a specified price per thousand, according to measurement, is stopped by the employer before completion, and it is afterwards agreed that he shall proceed with the work, and be paid a reasonable compensation without regard to the price fixed by the original contract, and he to waive all claim for damages, the question whether the openings in the walls shall be included in the measurement becomes immaterial, as the contractor will be entitled to recover what his work is reasonably worth. *Illinois Educational Association* v. *Strauder*, 35.

ON SALE OF GRAIN FOR FUTURE DELIVERY.

5. *Measure of damages in suit against the buyer for refusing to receive.* Where corn is to be delivered upon ten days' notice by the buyer that he is ready to receive it, and the buyer neglects to give such notice in a reasonable time, the seller may offer to deliver the corn without such notice, and demand the contract price, and if the buyer refuses to receive the corn and pay for it, the seller can recover from him the difference between the contract price and the market value of the corn at the time of such offer to deliver, at the place where, by the contract, it should be delivered. *Sanborn et al.* v. *Benedict*, 309.

WHERE PLEDGED PROPERTY IS SOLD.

6. *Without observing the terms of the agreement.* Where property held in pledge, has been sold by the pledgee, without notice to or the consent of the pledgor, when, by the terms of the contract under which the property was pledged, the pledgor had the right to determine the time when the sale should be made, in an action by the pledgor against the purchaser from the pledgee for money had and received, the plaintiff will be entitled to the market value of the property at the time it was converted into money by the defendant. *Belden* v. *Perkins*, 449.

AS BETWEEN LANDLORD AND TENANT.

7. *On failure by tenant to make improvements.* Where land is leased to a tenant for a definite term, in consideration of improvements to be made and completed during such term, and he fails to make and complete such improvements, the lessor can only recover what it would cost to make such improvements, and the difference of the rental value of the land until such improvements could be made, after the expiration of said term. *Raybourn* v. *Ramsdell*, 622.

MEASURE OF DAMAGES.

AS BETWEEN LANDLORD AND TENANT. *Continued.*

8. In such case, it is error to admit evidence to prove the difference in the rental value of the land as it was and as it would have been if the improvements had been made, for the purpose of charging the tenant with that difference, whilst he held under the lease. *Raybourn* v. *Ramsdell*, 622.

IN SUIT TO RECOVER INSTALLMENTS.

9. Where a suit is brought on a contract payable in installments, the plaintiff can only recover the amount that was due at the time the suit was brought, although at the time of the trial all the installments may have matured. *Hamlin, Hale & Co.* v. *Race*, 422.

10. *Where employee has been discharged before the expiration of his term of employment.* Where a plaintiff has been employed by the defendant for one year, at a specified salary, payable in monthly installments, and before the year expired he was discharged, and afterwards, and before the end of his term, he brought suit, claiming that the contract was still in force, and that he was and had been ready and willing to perform, it was *held*, that he could only recover for the installments that had matured at the time the suit was brought, notwithstanding the term had expired before the cause was tried. Ibid. 422.

11. If, when he was discharged, he had terminated the agreement, and sued on the breach of the contract, and the cause was not tried until the term had expired, and it had then appeared that he had been unable to procure employment during the time, it may be that he could have recovered for all the damage he had sustained during the term by the breach of the contract. Ibid. 422.

BY ONE WHO ABANDONS A CONTRACT.

12. *Because payment is refused in installments, as agreed upon.* Where, by the terms of a contract, parties performing labor under it are to be paid at the end of each month, for the labor performed to that time, and they are not paid at the stipulated time, and are, by reason thereof, compelled to abandon the work, they have the right to do so, and are entitled to recover for the work done and not paid for, *pro tanto*, at the contract price. *Dobbins et al.* v. *Higgins et al.* 440.

EXCESSIVE DAMAGES.

13. *For personal injuries from negligence of defendant.* In a suit against a railway company to recover for a personal injury, where the negligence of the defendant, if any, was very slight, and the plaintiff had no bones broken, and was not disabled from working for more than nine months, and the injury did not appear to be permanent, it was *held*, that $5000 damages were excessive. *Chicago, Rock Island and Pacific Railroad Co.* v. *McKitrick*, 619.

MEASURE OF DAMAGES. *Continued.*

DAMAGES ON DISSOLUTION OF INJUNCTION.

14. *Of the measure of recovery.* See INJUNCTIONS, 12, 13.

MECHANIC'S LIEN. See LIENS, 4, 5, 6.

MISTAKE.

CORRECTING ATTACHMENT BOND.

1. A court of equity will not assume jurisdiction to reform an attachment bond for a mistake, as the party complaining had an ample remedy at law to have the same corrected in the court where the attachment was pending. *Craft* v. *Dickens*, 131.

MONEY HAD AND RECEIVED.

OF AN ACTION THEREFOR. See ASSUMPSIT, 1, 2, 3.

MONEY PAID, ETC.

WHEN ACTION WILL LIE THEREFOR. See ACTIONS, 1.

MORTGAGES.

WHETHER CONVEYANCE INTENDED AS A SECURITY.

1. Where a deed of trust has been foreclosed by a sale under its provisions, and the fee vested in the *cestui que trust*, a party purchasing from him afterwards can not be considered as having purchased the deed of trust to be held as security for the money expended in such purchase, although he may have made a verbal promise to the grantor that he would purchase the land and convey it to him upon repayment to him of all money expended. *Wilson* v. *McDowell*, 514.

2. Nor can the purchaser, under such circumstances, be treated as the agent of the grantor in the deed of trust, in making such purchase, and as holding the title as a trustee. Ibid. 514.

3. When a verbal contract is set up to overcome and defeat a deed, loose, indefinite and unsatisfactory evidence will never be sufficient; it must be clear and convincing in its character. Ibid. 514.

MUNICIPAL CORPORATIONS. See CORPORATIONS, 1 to 17.

MUNICIPAL SUBSCRIPTION AND BONDS.

WAIVER OF CONDITIONS.

1. If county authorities issue and deliver the bonds of the county to a railway company before performance of the conditions upon which they were to be issued and delivered, this will be a waiver of the condition by the county. *Chiniquy* v. *The People ex rel. Swigert*, 570.

NATURALIZATION.

JURISDICTION OF COUNTY COURTS.

1. The county courts of this State have jurisdiction to grant certificates of naturalization to aliens. *Dale* v. *Irwin*, 170.

2. *Former decision.* The doctrine on this subject, as announced in *The Board of Supervisors of Knox County* v. *Davis*, 63 Ill. 405, is overruled. Ibid. 170.

NATURALIZATION OF ADULT.

3. *Effect upon illegitimate children.* A foreign born person, who was alleged to be illegitimate, came to this country as a member of the family of his reputed father, whose wife was the mother of the boy. The reputed father was naturalized while the alleged illegitimate child was an infant: *Held*, as the child was a member of his reputed father's family when his father was naturalized, and he an infant, that by virtue of the act of Congress he became naturalized, and that the question of his legitimacy would not be inquired into in a proceeding to contest an election. Ibid. 170.

NEGLIGENCE.

NEGLIGENCE IN RAILROADS.

1. *Permitting weeds to grow on right of way, so as to obstruct view of highway crossing.* It is negligence in a railway company to permit or suffer weeds or anything else to grow upon its right of way to such a height as to materially obstruct the view of a highway crossing, and if injury results to stock at such crossing, that might have been avoided but for such obstruction, the company will be liable. *Indianapolis and St. Louis Railroad Co.* v. *Smith*, 112.

2. *Omission to give signal, and running at too high a rate of speed in a city.* A person was crossing a street in a city, after nightfall, in which there were four railroad tracks, upon which trains were passing at short intervals at all hours of the day, and just as he was stepping upon the farthest track in the direction he was going, he was struck by an approaching train, and injured to such an extent that he soon afterwards died. The company employed a watchman, whose duty it was to warn persons crossing the tracks of danger from approaching trains, and, in view of the character of the thoroughfare, such a precaution was proper and necessary. But, at the time of the accident, the watchman was not present attending to his duty, and the train was running at a much higher rate of speed than was allowed by an ordinance of the city, and it was a question whether a bell was rung or a whistle sounded upon the engine: *Held*, under the circumstances, an omission of any one of the duties mentioned would constitute gross negligence on the part of the company. *St. Louis, Vandalia and Terre Haute Railroad Co.* v. *Dunn, Admx.* 197.

NEGLIGENCE. *Continued.*

CONTRIBUTORY NEGLIGENCE.

3. Upon a review of the facts in this case, it is *held*, there was no such contributory negligence on the part of the person injured as would relieve the company of liability. If he saw the head-light upon the locomotive, in the darkness, and in the absence of any signal or warning, either from the watchman or from the bell or whistle, he would probably be unable to discover that it was in motion, or if he saw the engine approaching, he had the right to suppose it was not moving at a rate of speed greater than was proper at that time and place, and to regulate his own conduct accordingly. The omission of proper precautions by the company would, under the circumstances, tend to relieve the party from the charge of negligence on his part. *St. Louis, Vandalia and Terre Haute Railroad Co.* v. *Dunn, Admx.* 197.

4. *Injury to child when person in charge of child is negligent.* The negligence of a parent or guardian having in charge a child of tender years will not excuse a carrier by rail from using all the means in its power to prevent injury to the child; yet if the negligence of the former is the proximate cause of the injury to the child, by unnecessarily and imprudently exposing it to danger, the carrier can not be held responsible, unless it is shown to have omitted duties, the discharge of which would have averted the injury. *Ohio and Miss. Railway Co.* v. *Stratton*, 88.

5. *Passenger getting off train while in motion.* A passenger has no right to attempt to get off a train of cars when in motion, and if he undertakes to do so without the knowledge or direction of any employee of the company, it is at his peril, and he must bear the consequences, however disastrous. Ibid. 88.

6. Thus, where a father took passage, with his son, aged about ten years, upon a train of cars, being assured that the train would stop at a certain station, and when the whistle was sounded for such station, he and his son went out of the coach upon the platform, and stepped down on the steps, and, being burdened with luggage, stepped off the train before it had stopped, and the son was thrown upon the station platform, and from there fell under the wheels of the cars, where he received such an injury as to cause the loss of both legs, it was *held*, that no recovery could be had against the company. Ibid. 88.

NEW TRIALS.

NEWLY DISCOVERED EVIDENCE.

1. It is not error to refuse a new trial on the ground of newly discovered evidence, where the evidence is merely cumulative. *Skelly* v. *Boland*, 438; *Schoenfeld* v. *Brown et al.* 487.

NEW TRIALS. *Continued.*

VERDICT AGAINST THE EVIDENCE.

2. This court will not interfere with the verdict of a jury when the evidence is conflicting, even though it seems to preponderate against the verdict, unless it is apparent the jury have been actuated by passion or prejudice, and rendered a verdict manifestly wrong. *Plummer* v. *Rigdon*, 222; *Miller* v. *Balthasser*, 802.

EXCESSIVE DAMAGES. See MEASURE OF DAMAGES, 13.

NOTICE.

NECESSITY OF NOTICE.

1. *To bind a party.* It is a rule of general application, that a party can not be deprived of his rights without having notice and an opportunity to be heard. When the proceeding is summary, and the notice only constructive, the courts will never abridge the right to notice, or substitute another for it. *Chicago and Alton Railroad Co.* v. *Smith*, 96. See PARTIES, 1, 2.

IN WHAT MANNER TO BE GIVEN.

2. *When no mode is prescribed.* Where a notice is required by statute, and the mode of service is not specified, it must be personal; and usually, when notice is required by publication, it must be directed to the person, by name, who is required to be notified. Ibid. 96.

POSSESSION UNDER UNRECORDED DEED.

3. Actual possession of real estate under an unrecorded deed, although the improvements are not valuable, is sufficient notice to a subsequent purchaser, either at a private or judicial sale, of the occupant's interest and title. *Phillips* v. *Pitts & Co.* 72.

UNDER THE RECORDING ACT.

4. *Notice afforded thereby.* See RECORDING ACT, 1.

ON REDEMPTION BY A JUDGMENT CREDITOR.

5. *Under judgment obtained in another county—diligence in giving notice thereof—who may question it.* See REDEMPTION, 1.

IN PROCEEDING TO CONDEMN RIGHT OF WAY.

6. *Of the notice required.* See EMINENT DOMAIN, 1, 2.

SALE OF GRAIN FOR FUTURE DELIVERY.

7. *Notice by purchaser of readiness to receive.* See SALES, 9.

SELECTION OF FENCE VIEWERS.

8. *Notice should be given.* See FENCES, 1.

NUNCUPATIVE WILLS. See WILLS, 10 to 14.

OATHS.

ADMINISTERED OUT OF OFFICER'S DISTRICT. See CRIMINAL LAW, 2, 3.

OFFICERS.

OFFICIAL ACTS OUT OF THE DISTRICT.

1. Unless authorized by statute, an officer can perform no official act outside of and beyond the territorial limits in which he is authorized and required to act. An assessor not being authorized to assess property out of his township, can not, lawfully, administer an oath to a person, except in his township, in relation to his rights and credits liable to assessment. *Van Dusen* v. *The People*, 645.

SCHOOL DIRECTORS.

2. *Of their power to make purchases and contract debts.* See SCHOOL DIRECTORS, 1 to 4.

SCHOOL TREASURER.

3. *Liability for releasing mortgage.* See SCHOOL TREASURER, 1.

WRONGFULLY ISSUING ATTACHMENT.

4. *Liability of officer in trespass.* See TRESPASS, 1, 2.

CLERK OF JUSTICE OF THE PEACE.

5. *Is an officer unknown to the law.* See CERTIORARI, 2.

OFFICIAL BONDS.

TOWNSHIP COLLECTOR.

1. The statute requires a township collector to give a bond within eight days after he receives notice of the amount of taxes to be collected by him, and also requires the county clerk to have the collector's books ready for delivery to him within ten days after the first of December, and that the collector shall, within the same time, or as soon thereafter as he is qualified, call at the county clerk's office for the books, and there is no provision for notice being given to the collector of the amount of tax to be collected; hence it is the duty of the collector to call at the clerk's office and there get the notice of the amount of tax, within the time provided by law for the books to be ready for delivery. *Ross* v. *The People ex rel. Johnson*, 375.

2. Where a township collector received from the county clerk an official bond, with the proper amount named in it, for him to execute and obtain securities on, this was a sufficient notice of the amount of taxes to be collected by him, and it was his duty to have the bond executed and presented to the proper authority for approval within eight days thereafter, and his failure to do so was properly deemed a refusal to serve, and the town board were justified in refusing to approve such bond when afterwards presented, and in appointing another person to the office. Ibid. 375.

UPON WHICH OF TWO BONDS LIABLE.

3. *In case of re-election.** Where a supervisor is elected his own successor, and gives a new bond, the sureties are liable on such bond

*See *Kagay* v. *Trustees of Schools*, 68 Ill. 75.

OFFICIAL BONDS. Upon which of two bonds liable. *Continued.*

for any amount which appears to have been in the hands of such supervisor belonging to the town, at the end of the preceding official term. *Morley* v. *Town of Metamora*, 394.

4. A supervisor was elected for a second term, and at the end of the first term made a report, showing a certain amount in his hands belonging to the town, which report was approved: *Held*, that such report must be considered as true, and that such amount was in his hands as his own successor, and that the sureties on his bond for the second term are liable for a failure on his part to account for it. Ibid. 394.

ORDINANCES OF A CITY. See CORPORATIONS, 1 to 6.

PARENT AND CHILD.

Necessaries furnished infant by third person.

1. *Liability of the father.* Either an express promise, or circumstances from which a promise by the father can be inferred, is essential, in all cases, to bind him for necessaries furnished his infant child by a third person. *McMillen* v. *Lee*, 443; *Gotts* v. *Clark*, 229.

2. Goods which were necessary to the comfort of a minor daughter of the defendant, were sold to her whilst she was living away from home, and receiving her own wages, and charged to the father: *Held*, that the father was not liable. *Gotts* v. *Clark*, 229.

3. *The mother as agent.* Where the father and mother separate by mutual consent, and the father permits the mother to take the children with her, then the father constitutes the mother his agent to provide for his children, and is bound by her contracts for necessaries for them. *McMillen* v. *Lee*, 443.

PARTIES.

Only parties are bound.

1. A person not made a party to a proceeding for partition, and who is not served with process, and who does not enter any appearance, is not bound by any decree rendered therein, and his interest or title in the premises will not be affected in the least. *Borders et al.* v. *Murphy*, 81.

2. To bind a party by judicial sentence, he must be made a party to the proceeding, and must have either actual or constructive notice thereof, or enter his appearance. Ibid. 81.

On bill for specific performance.

3. If A, as the agent of B, contracts to sell land belonging to C, where it is claimed that C afterward adopted the sale, B and the heirs of A, the agent, are improper parties to a bill to enforce specific

PARTIES. ON BILL FOR SPECIFIC PERFORMANCE. *Continued.*

performance against C, and if made parties, the bill will be bad on demurrer for that reason. *Roby* v. *Cossitt et al.* 638.

IN SUIT AGAINST BORROWER.

4. *Who should be sued.* Where a wife borrows property, which is injured before its return, she alone is liable to the lender, and it is not error in the court to allow a dismissal as to the husband, on appeal, when both have been sued before a justice of the peace. It would be otherwise if the husband was liable. *Hagebush* v. *Ragland*, 40.

ON PETITION FOR DOWER.

5. *Who should be made parties.* See DOWER, 4.

INSANE PERSONS.

6. *In whose name to sue.* See INSANE PERSONS, 1, 2.

PARTITION.

PAROL PARTITION.

1. *Whether binding on the parties.* A parol partition of land between tenants in common, carried into effect by possession taken by each party of his respective share according to the partition, will be valid and binding on the parties. *Shepard* v. *Rinks*, 188.

2. *What constitutes such a partition.* One of two tenants in common of land sold and conveyed by warranty deed one-half the premises, as an entirety, to a stranger. Subsequently, the same party, as the attorney in fact of his co-tenant, contracted to sell the remaining half, and that sale was consummated by the principal executing a deed to the purchaser for such remaining half, the party making the sale being present at the execution of the deed and signing his name as a witness thereto. This disposition of the land seems to have been acquiesced in by the respective co-tenants for nearly thirty-eight years, when he who first conveyed brought ejectment against a remote grantee of his co-tenant to recover an undivided half of the half of the land which the latter had so conveyed: *Held*, that, upon the facts, there was at least a parol partition of the land between the tenants in common, each taking the portion so disposed of by him, so that the defendant in ejectment was not guilty of unlawfully withholding the possession from the plaintiff. Ibid. 188.

PARTNERSHIP.

SUFFICIENCY OF PROOF.

1. Where two persons purchased a mill and house, which they commenced to remove, but before the removal, one of them died, it was *held*, the general declarations of the deceased that they had bought the mill in partnership, no terms of partnership being stated, did not afford satisfactory evidence of the existence of the partnership, as such declarations might well consist with there being nothing more than a tenancy in common. *Gregory* v. *Martin, Admr.* 38.

PARTNERSHIP. *Continued.*

AUTHORITY OF THE SEVERAL PARTNERS.

2. *To sign notes in firm name.* Each partner is the agent of the other to sign the partnership name to notes given within the scope of the partnership business, but not to sign the firm name to notes relating to business outside of the scope of the partnership. *Zuel* v. *Bowen*, 234.

PLEA DENYING PARTNERSHIP.

3. *Should be in abatement.* See ABATEMENT, 2.

PENALTY.

PENALTY TO SECURE PROMPT PAYMENT.

1. *Not usurious.* See USURY, 1.

RELIEF IN EQUITY AGAINST PENALTY.

2. *Whether granted.* See CHANCERY, 27.

PLEADING.

OF THE DECLARATION.

1. *On an appeal bond.* In a suit upon an appeal bond, which is in due form, and which recites a judgment in an inferior court and an appeal to the Supreme Court, and the declaration avers that the judgment was affirmed in the Supreme Court, it is sufficient, without any averment, that the bond was filed and approved in pursuance of an order of the court, as the presumption is that it was so filed and approved. *Courson* v. *Browning et al.* 208.

2. *When the particular damage should be alleged.* See PLEADING AND EVIDENCE, 1, 2.

VARIANCE.

3. *As to instrument sued on.* In a suit upon a bond for a breach of its conditions, where there was also a contract between the principal in the bond and the obligee, respecting the sale of sewing machines, the declaration showed that, by the contract, the obligee in the bond reserved the right to make sales in the territory named, while the condition of the bond showed that the other party had the exclusive right of purchasing from him the machines: *Held*, that there was no fatal variance, as the suit was upon the bond only. *Brown* v. *Rounsavell*, 589.

DEMURRER.

4. *What it admits.* A demurrer to a bill in equity only admits that which is well stated or pleaded, but it can not supply defects in substance, or aid that which is defectively set forth. *Roby* v. *Cossitt et al.* 638.

PLEADING. *Continued.*

PLEADING TAKEN MOST STRONGLY AGAINST THE PLEADER.

5. The rule of law is, that the allegations in a bill or other pleading shall be construed most strongly against the pleader. *Roby* v. *Cossitt et al.* 638.

BANKRUPTCY.

6. *Should be specially pleaded.* See BANKRUPTCY, 1.

STATUTE OF LIMITATIONS.

7. *Must be specially pleaded.* See LIMITATIONS, 4.

PLEA DENYING PARTNERSHIP.

8. *Should be in abatement.* See ABATEMENT, 2.

FILING ADDITIONAL PLEAS.

9. *When it ought to be allowed.* See PRACTICE, 6.

PLEADING AND EVIDENCE.

WHEN THE PARTICULAR DAMAGE SHOULD BE ALLEGED.

1. *To render proof thereof admissible.* It is a rule of pleading that, whenever the damages sustained have not necessarily accrued from the act complained of, and consequently are not implied by law, the plaintiff must state the particular damage he has sustained, to enable him to give evidence of it. *Adams* v. *Gardner*, 568.

2. In an action for damages for driving against a plaintiff's phaeton and breaking it, the declaration stated that the plaintiff was compelled to expend $500 for repairs, and that the phaeton became useless: *Held*, that this was broad enough to admit evidence of cost of repairs and of diminished value of the phaeton after it was repaired, but, that evidence in regard to the loss of the use of the phaeton, while being repaired, was inadmissible, no special damage on that account being alleged. Ibid. 568.

EVIDENCE SHOULD BE PERTINENT TO THE ISSUE.

3. It is not error for the court to reject evidence which is not pertinent to the issue, considered by itself, and which is not followed up by any evidence which would make it pertinent. *Doran* v. *Mullen*, 342.

ALLEGATIONS AND PROOFS.

4. *In chancery, evidence confined to case presented by the pleadings.* On bill to foreclose a mortgage given to secure a written agreement to repay a certain sum of money in case the same is not realized by the sales of a patent, etc., it will not be proper to go back of the mortgage and agreement to establish a debt upon which to base a decree of foreclosure, in the absence of allegations in the bill justifying the same. *Berger et al.* v. *Peterson*, 633.

5. *In ejectment as to description of land.* If the plaintiff in ejectment, in his declaration, describes the land sued for as lying south

PLEADING AND EVIDENCE.

ALLEGATIONS AND PROOFS. *Continued.*

of the *west* half of a given quarter section, and between the south line of such a quarter and a bayou, and the proof shows that his land lies south of the *east* half of the same quarter, he can not recover. *McCormick* v. *Huse*. 363.

EVIDENCE ADMISSIBLE BY STIPULATION.

6. *Under certain issues.* Where the declaration contained only the common counts, and there was a stipulation between the parties that the plaintiff might introduce any evidence that would be admissible under any special count that could be drawn on the contract, and the plaintiff amended his account by adding an item thereto, for which a special count had been drawn: *Held*, that, under the stipulation, evidence as to such item could have been introduced without amending the account, and it was not error to refuse a continuance on account of such amendment. ***Dobbins et al.* v. *Higgins et al.*** 440.

AS TO FACT OF EXECUTION OF NOTE.

7. In a suit upon a promissory note, where the parties sued were in fact partners, and the firm name was improperly signed to the note for the private purposes of one of the partners, then, in order to place the *onus* upon the plaintiff to prove the joint liability of the defendants or the proper execution of the note in the name of the firm, the other partner should file a plea denying the execution of the note, verified by affidavit. *Zuel* v. *Bowen*, 234.

8. *In proceeding before justice of the peace, how such an issue to be presented.* See JUSTICES OF THE PEACE, 3, 4.

WHAT SHOULD BE SPECIALLY PLEADED.

9. *Bankruptcy.* See BANKRUPTCY, 1.

10. *Statute of Limitations.* See LIMITATIONS, 4.

PLEDGE.

WHAT CONSTITUTES A PLEDGE.

1. Where a tenant placed a lot of corn in the hands of the administrator of his landlord, as security for the payment of rent due, it was *held*, the legal status was that of pledged property; and the mere fact that the pledgor had the right to determine the time when the corn should be sold, did not affect the legal character of the contract. *Belden* v. *Perkins*, 449.

RIGHTS AND POWER OF PLEDGEE.

2. Where property is pledged, the pledgee acquires a special property therein, and he may transfer the same without impairing the original lien thereon, or giving the owner a right to reclaim it on any other or better terms than he could have done before such transfer. Ibid. 449.

PLEDGE. *Continued*

MEASURE OF DAMAGES.

3. *On sale of pledged property contrary to terms of the agreement.* See MEASURE OF DAMAGES, 6.

POLICE FORCE OF CITIES.

UNDER ACT OF APRIL 10, 1872.

In whom is vested the control. See CHICAGO, CITY OF, 1 to 4.

POSSESSION.

WHAT AMOUNTS TO POSSESSION.

1. *By an infant taken into the family of the owner.* If an infant, eighteen months of age, is taken into the family of the owner of land, under a verbal agreement between the father of the infant and the owner of the land, that the infant was to live with and be raised by such owner as his child, and that the owner was to give all his land to such child in consideration thereof, and such infant continued so to live with the owner until his death, this would not constitute possession of the land by such infant. *Cuddy* v. *Brown et al.* 415.

OF NOTICE BY POSSESSION.

2. *Under an unrecorded deed.* See NOTICE, 3.

POSSESSION OF PROMISSORY NOTE.

3. When indorsed in blank, is evidence of title. *Palmer* v. *The Nassau Bank*, 380.

TO MAINTAIN FORCIBLE ENTRY AND DETAINER.

4. *Of the requisite possession.* See FORCIBLE ENTRY AND DETAINER, 1.

POWER OF ATTORNEY

TO ENTER APPEARANCE AND CONFESS JUDGMENT.

What is a compliance with the power. See JUDGMENTS, 6, 7.

PRACTICE.

AFFIDAVIT OF CLAIM.

1. *When sufficient to require affidavit of merits with a plea.* Where the caption to an affidavit was, "State of Illinois, Cook county, ss.," and the jurat was signed by one purporting to be a notary public, it was objected that it did not appear of what county or State the officer was a notary, or whether the affidavit was made before him in Illinois or some other State: *Held*, the affidavit was sufficient in the respect objected to. *Palmer* v. *The Nassau Bank*, 380.

2. *Time of filing it.* An affidavit of claim filed more than ten days before the convening of the court for the term at which the declaration is filed, will be regarded as having been filed "with the declara-

PRACTICE. AFFIDAVIT OF CLAIM. *Continued.*

tion," within the meaning of the statute. *Goldie* v. *McDonald et al.* 605.

3. *Amendment.* Where an affidavit of claim, filed with the declaration, was sworn to before a notary public of another State, it was not error to permit an additional certificate made by such notary, that, by the laws of such State, he was authorized to administer oaths, to be filed by way of amendment. Ibid. 605.

AFFIDAVIT OF MERITS.

4. *Effect of delay in filing.* Where an affidavit of claim was filed with the declaration, and the defendant was allowed full five days within which to file an affidavit of merits with his plea, and failed to do so, it was proper to strike the plea from the files, and render judgment against the defendant, as upon default. Ibid. 605.

GIVING TIME TO PLEAD.

5. *How far discretionary.* The giving of time to plead is a matter of discretion with the court, and a refusal to give such leave is not subject to review in this court, where no abuse of discretion appears. *Culver* v. *The Hide and Leather Bank of Chicago*, 625.

OF FILING ADDITIONAL PLEAS.

6. *When leave should be given.* Leave should be given to a defendant who has pleaded the general issue, to file additional pleas, where it appears that an additional plea is indispensable to enable the defendant to make a legal defense, and he has been guilty of no culpable negligence in asking for such leave. *Misch* v. *McAlpine et al.* 507.

TRIAL WITH DEMURRER UNDECIDED.

7. Where parties go to trial by consent, with a demurrer to a count of the declaration undecided, it will be no cause for the reversal of the judgment. *Belleville Nail Mill Co.* v. *Chiles*, 14.

PLEA NOT IN THE RECORD.

8. *Replication thereto.* If a replication is to a plea not in the record, it might properly be stricken from the files, but it would be no ground of demurrer. *Gardner et al.* v. *Russell*, 292.

EXAMINATION OF WITNESSES.

9. *When leading questions may be asked.* It is discretionary with the court to permit leading questions to be asked, and when a witness is unwilling, or very ignorant, a fair administration of justice requires that such a course should be allowed. *Doran* v. *Mullen*, 342.

TIME TO OBJECT, ETC.

10. *Insufficient cost bond.* An objection to a bond for costs, to be availing, should be taken at the earliest opportunity. The defendant can not raise such an objection for the first time after plea filed, or proceeding to trial, or default entered, or on error. *Courson* v. *Browning et al.* 208.

PRACTICE *Continued.*

READING LAW TO THE JURY.

11. Counsel should not be permitted, in civil cases, to read law to the jury. It is for the court to instruct the jury as to the law governing the case, and not for them to determine it for themselves by having law books read to them. And it does not obviate the objection, that the reading is for the purpose of illustration only. *City of Chicago* v. *McGiven*, 347.

TIME OF READING PAPER TO THE JURY.

12. *During the closing argument.* Where the execution of the instrument sued on had been proved, and other evidence adduced in relation to it, it was a proper exercise of discretion for the court to permit the counsel for the plaintiff to read it to the jury, for the first time, in his closing argument. *Berrington* v. *Casey*, 317.

REMARKS BY THE COURT IN HEARING OF THE JURY.

13. It is not proper for a court to make remarks, in the hearing of the jury, calculated to influence their finding. *Skelly* v. *Boland*, 438.

14. Where a plaintiff had closed his case, and had shown a right to recover, the defendant moved a non-suit, which the court denied, and remarked, in the hearing of the jury, that, upon the evidence then in, the plaintiff would be entitled to recover, unless the defendant made a defense: *Held*, that any interference by the court, by remark or otherwise, within the hearing of the jury, except by way of instructions, is improper, but this court will not reverse for that reason, when it is apparent that the remark did not prejudice the defendant's case. Ibid. 438.

MODE OF TRIAL.

15. *Can not be objected to by party consenting to it.* When the question of the probate of a will was, by consent of the contestant, submitted to the circuit court upon the evidence produced in the county court, instead of a trial *de novo*, he is bound by his consent, and can not assign the mode of trial as error on appeal to the Supreme Court. *Doran* v. *Mullen*, 342.

SIGNING JUDGMENT ON PLEA OF TENDER.

16. *Of the practice in respect thereto.* See TENDER, 3.

ENTERING JUDGMENT NUNC PRO TUNC.

17. *When it may be done.* See JUDGMENTS, 2.

PUTTING VERDICT IN FORM. See VERDICT, 1.

PRACTICE IN THE SUPREME COURT.

WHO MAY ASSIGN ERROR.

1. An appellant can not allege errors which relate exclusively to a party who is not complaining, and is not before the court. *Richards* v. *Greene*, 525.

PRACTICE IN THE SUPREME COURT.

WHO MAY ASSIGN ERROR. *Continued.*

2. It is irregular to direct commissioners to set off homestead to the wife when it belongs to the husband, but when the final decree gives the homestead so set off to the husband, he is not injured, and can not assign error on such irregularity. *Richards* v. *Greene*, 525

CHANGING RECORD UPON AFFIDAVIT.

3. An affidavit that the defendants, against whom a decree was entered by default in the court below, were minors, can not be filed and read in the Supreme Court. This court is bound to look at the record as it comes from the inferior court. *Newlin et al.* v. *Snyder et al.* 528.

4. This court can not act upon and give effect to an affidavit impeaching the correctness of a transcript filed herein, as against the certificate of the clerk. *Owen* v. *Stevens*, 462.

ERROR WILL NOT ALWAYS REVERSE.

5. *Giving improper instructions.* In a suit brought by a physician against the father, for medical attendance on his infant child, it is wrong to instruct the jury that the father is liable, if the services rendered were necessary, without reference to any promise, express or implied. But if the evidence was such as to leave no doubt that there was an implied promise, and the jury were distinctly instructed, on behalf of the defendant, that there must have been a promise, express or implied, the defect in the instruction would do the defendant no such harm as to require a reversal of the judgment. *McMillen* v. *Lee*, 443.

6. Where an instruction is given upon a point that does not properly arise in the case, and it is not calculated to mislead the jury, or to prejudice them against the opposite party, the judgment will not be reversed, even though the instruction may have been improperly given. *Tuttle et al.* v. *Robinson*, 332.

7. *Where the judgment was right.* Where the whole record was open for inspection this court will look to see where the right and justice of the case are, and although the court below may have erred in the admission of improper evidence, and in some of its instructions, yet if, by eliminating the improper testimony and instructions based on it, the plaintiff has made no case, a judgment against him will not be reversed. *Hopkins* v. *Indianapolis and St. Louis Railroad Company*, 32.

REMITTITUR.

8. *Obviating error thereby.* If a party in this court remits the amount of a particular item of account included in his judgment, this will obviate any conceived error in refusing an instruction relating to such item. *Nixon* v. *Halley*, 611.

9. *Of the costs in such case.* See COSTS.

PRESUMPTIONS.

OF LAW AND FACT.

1. *As to absence of error in proceedings in court below.* See EXCEPTIONS AND BILLS OF EXCEPTIONS, 1 to 5.

2. *As to several makers of a note—whether one is principal and the others only sureties.* See SURETY, 1.

3. *As to time of delivery of a deed.* See CONVEYANCES, 1.

4. *That a paper was signed understandingly.* See CONTRACTS, 11.

5. *A party presumed to be a resident in the county in which he is served with process.* See RESIDENCE, 1.

PRINCIPAL AND SURETY. See SURETY.

PROCESS.

SERVICE OF PROCESS.

1. *Recital of service.* Where a judgment recites due service of process on the defendant ten days before the first day of the term, and there is nothing in the record to impeach or contradict the recital, there is no want of jurisdiction, and the judgment is regular. *Courson* v. *Hixon*, 339.

2. *Service by special deputy.* It is no objection to the service of a *scire facias* that is was made by a special deputy, who had not taken an official oath. The statute requires a return made by a special deputy to be verified by his affidavit, and this is the only oath he is required to take. Ibid. 339.

SCIRE FACIAS.

3. *To make a defendant a party to a judgment, is nothing more than a summons.* The Practice Act of 1874 provides, that where judgment has been rendered against one of several joint defendants, a summons, in the nature of a *scire facias*, etc., may issue. This writ is a summons, and nothing more. Ibid. 339.

RETURN OF SERVICE.

4. *Return by deputy must be in principal's name.* If summons is served by a regular deputy of a sheriff, the return must be in the name of the latter. The act of the deputy in such case is, in law, the act of the principal. *Council of the Village of Glencoe* v. *The People ex rel. Owen*, 382.

5. *Rule different when made by a special deputy.* But where summons is served by a special deputy by appointment indorsed thereon, the statute does not require the return, which is to be made under oath, to be in the name of the sheriff. Ibid. 382.

MANDAMUS.

6. *Upon whom to be served.* See MANDAMUS, 6, 7.

PROCESS. *Continued.*

SENDING PROCESS TO FOREIGN COUNTY.

7. *In case of scire facias to revive judgment.* See JURISDICTION, 1, 2.

PURCHASERS.

PURCHASER OF EQUITY OF REDEMPTION.

1. *Effect of a conveyance of the equity of redemption to party secured, after he parts with the notes.* If a party, giving a deed of trust to secure the payment of notes to another, after the latter has parted with the notes for a valuable consideration, conveys the premises to the original holder of the notes, it will be subject to the trust deed, and all persons claiming under the latter will occupy no better position. *Buchanan* v. *The International Bank*, 500.

RAILROADS.

LIABILITY FOR ACCIDENTS, ETC.

1. *When company is not in fault—under act of* 1855. The act of 1855 making railroad companies liable for all expenses of the coroner and his inquest, and the burial of all persons who may die on its cars, or who may be killed by collision, or other accident occurring to such cars, or otherwise, is unconstitutional and void, so far as it attempts to make such companies liable in cases where they have violated no law, or have been guilty of no negligence on their part. *Ohio and Miss. Railway Co.* v. *Lackey*, 55.

RATIFICATION.

BY PRINCIPAL, OF ACT OF AGENT.

1. *What amounts to a ratification.* If one professing to act as the agent of A, makes a contract for the sale of land, an expression of willingness by A, the owner, to carry out its terms, can not be held a ratification of the contract. It is a mere promise to sell upon the same terms, and is not enforceable under the Statute of Frauds, unless reduced to writing and signed by the owner or some one by him lawfully authorized. *Roby* v. *Cossitt et al.* 638.

2. But if a person makes a written contract for the sale of land as the agent of the owner, although without authority, the owner may adopt it and make it his own, and the ratification will relate back to the act done. Ibid. 638.

WHAT AMOUNTS TO A RATIFICATION.

3. *As fixing one's relation as principal or surety.* See SURETY, 5.

AS TO EXECUTION OF NOTE.

4. *Effect of subsequent ratification.* Where a person's name is signed to a promissory note without his authority, he may ratify its execution and acknowledge its binding validity upon him, and when

RATIFICATION. As to execution of note. *Continued.*

this is done, his relation to the note will be precisely the same as if he had executed it personally. *Paul* v *Berry*, 158.

REAL AND PERSONAL PROPERTY.

Whether property is realty or personal property.

1. *The term "real estate"* embraces lands, tenements and hereditaments, and the general rule is, that buildings erected upon and fixed to land, become a part thereof. *Matzon et al.* v. *Griffin*, 477.

2. *A building erected by a tenant* upon leased premises, and, by agreement with the landlord, held as personal property, and removed at the expiration of the term. Ibid. 477.

3. *Buildings erected by the mortgagor upon the mortgaged premises.* Where a mortgagor, whilst the owner of the equity of redemption, erected a house upon the mortgaged premises, without any agreement with the mortgagee, the same became a part of the realty, and passed with it to the purchaser under the foreclosure of the mortgage. Ibid. 477.

4. In such case, where the mortgagor, after foreclosure of the mortgage, removed the house from the land, and the purchaser under the mortgage brought replevin, and recovered a judgment, the judgment was affirmed. Ibid. 477.

RECORDING ACT.

As notice.

1. Although a party purchasing notes secured by deed of trust upon real estate has no actual notice of a prior incumbrance, yet if it is upon the record at that time, and at the time the deed of trust was executed, he will be bound to take notice of such prior incumbrance, and its legal effect, and whatever rights he acquires by sale under his deed of trust, will be subject thereto. *Buchanan* v. *The International Bank*, 500.

RECOUPMENT.

When allowable.

1. *In case of sale of pledged property without consent of owner.* If the owner of property delivers the same to his creditor, as security for a debt, but reserves the exclusive right to determine when and how it shall be sold, and the creditor sells it without the knowledge or consent of the owner, in an action by the owner against the creditor for money had and received, the creditor may recoup the amount of the debt for which the property was pledged, and the same rule would apply if the suit was against the purchaser of the property. *Belden* v. *Perkins*, 449.

REDEMPTION.

BY A JUDGMENT CREDITOR.

1. *The question of diligence in giving notice.* The question of diligence in giving notice by a judgment creditor of the recovery of a judgment in another county, upon which a redemption of land from a prior sale is made, does not arise, unless there are intervening creditors to be affected by it. The purchaser at the prior sale can not raise this question. *Holmes* v. *Shaver*, 578.

2. *Title acquired by judgment creditor depends on validity of previous sale.* If a sale of land under execution is void by reason of the judgment or decree on which the execution issues being void, a redemption and sale by a judgment creditor will also be void, and no title will pass. *Mulvey* v. *Carpenter et al.* 580.

3. *Effect of redemption under void judgment.* Where a party redeemed land from a sale under an execution issued upon the transcript of a justice's judgment, in a case where the justice had no jurisdiction, and acquired a sheriff's deed on a sale under his execution, it was *held*, that the sale was a nullity, and passed no title whatever, but that the redemption money having been accepted, destroyed the prior sale and left the title to the land in the original owner. *Borders et al.* v. *Murphy*, 81.

4. *Effect of redemption under void execution.* Where a redemption of land, sold under a decree of foreclosure, was made after the death of the debtor by a judgment creditor, whose execution was void, and who had no right to levy and sell under the same, and the redemption money was accepted and acted upon as valid by the prior creditor, it was *held*, that the acceptance operated to extinguish the prior sale, the same as if the redemption had been properly made, and reinvested the heirs at law of the deceased debtor with the title to the land, and that they were not precluded from contesting the title claimed by such redeeming creditor, by sale under his execution. *Clingman et al.* v. *Hopkie*, 152.

REGISTRATION OF VOTERS. See ELECTIONS, 6.

RELEASE.

RELEASE OF SURETY.

By extension of time to principal. See SURETY, 2, 3, 4.

REMEDIES.

OMISSION OF ONE PARTY TO A CONTRACT.

1. *Remedy of the other party—whether by rescission or by action on the contract.* See CONTRACTS, 13 to 16.

REMEDIES. *Continued.*

REMEDY OF HEIRS.

2. *For moneys due from an administrator, after his death.* See ADMINISTRATION OF ESTATES, 8.

DAMAGES FOR DETENTION OF DOWER.

3. *Remedy for their recovery.* See DOWER, 6, 7.

TO QUESTION ONE'S RIGHT TO AN OFFICE.

4. *Remedy not in chancery.* See INJUNCTIONS, 3, 4.

WRONGFULLY SUING OUT ATTACHMENT.

5. *Of the various remedies therefor.* See ATTACHMENT, 2.

AS BETWEEN LANDLORD AND TENANT.

6. *Remedy of tenant where landlord puts another in possession.* See LANDLORD AND TENANT, 2.

REMEDIES AGAINST MARRIED WOMEN.

7. *Upon their contracts.* See MARRIED WOMEN, 3, 4.

SALE OF PROPERTY TO SCHOOL DIRECTORS.

8. *Remedy of the seller when the purchase was without authority.* See SCHOOL DIRECTORS, 4.

LOST TRANSCRIPT FROM JUSTICE'S DOCKET.

9. *How restored to files in the circuit court.* See CHANCERY, 3.

WHERE CREDITOR HAS SEVERAL SECURITIES.

10. *He may resort to either or all of them.* See DEBTOR AND CREDITOR, 3.

ENFORCEMENT OF LIENS.

11. *Remedy in equity.* See LIENS, 8.

REMITTITUR.

IN THE SUPREME COURT. See PRACTICE IN THE SUPREME COURT, 8.

REPLEVIN.

WHETHER DEMAND NECESSARY.

1. Where property, in the possession of the agent of the owner, is levied on by an officer under an execution against a third party, and then turned over by the officer to such agent, to hold as his custodian, it is not necessary for the owner to make a demand before bringing replevin against such officer and custodian. *Tuttle et al.* v. *Robinson*, 332.

2. Where an officer levies an execution on property in the possession of the defendant in the execution, as his property, he only discharges his duty, and his possession is lawful, and if another party claims the goods, he must make a demand before he can maintain replevin for them; but if the goods are in the possession of the party so claiming them when levied on, then no demand is necessary. Ibid. 332.

RESCISSION OF CONTRACTS. See CONTRACTS, 13 to 17.

RESIDENCE.

PRESUMPTION.

1. *As to residence of defendant.* A defendant will be presumed to be a resident of the county in which he was served with process, within the meaning of section 37 of the Practice Act, Revised Laws 1874, until, in some appropriate manner, it is made to appear, from the evidence, he is not. *Goldie* v. *McDonald et al.* 605.

RETURN OF SERVICE OF PROCESS. See PROCESS, 4, 5.

RIGHT OF WAY. See EMINENT DOMAIN.

SALES.

SALE OF GOODS BY SAMPLE.

1. *Delivery ticket.* Where goods in the hands of a carrier are sold by sample, and a delivery ticket, in the form of an order, by the proper railroad or station agent, to deliver the goods therein described to the person therein named or bearer, is delivered to the purchaser, with a sample, the title to the goods is thereby completely vested in the purchaser, and if they are afterwards destroyed it is his loss, and and he is liable for the price agreed on. *Webster et al.* v. *Granger et al.* 230.

2. *Time to buyer to examine goods.* There can be no custom giving a purchaser, by sample, 24 hours, or any other time, to examine the goods. He purchases by sample, and if the goods do not prove equal to the sample, he may return them, or sue for and recover the difference. Ibid. 230.

SALE AND DELIVERY OF CIGARS.

3. *Whether in violation of the revenue laws of the U. S. requiring stamping.* A sale of a lot of cigars at the factory where made, before they are all boxed, or any of them stamped, and delivery of possession, will not be invalid between the parties, under the act of Congress imposing a forfeiture for selling, or offering to sell, cigars before they are boxed and stamped, where the contract of sale provides that they shall be stamped as the law requires, before their removal. *Straus et al.* v. *Minzesheimer*, 492.

DELIVERY OF GOODS SOLD.

4. Is not necessary to pass title, as between the parties to the sale. *Webster et al.* v. *Granger et al.* 230.

5. *What amounts to a delivery.* In a contract of sale, the title will pass to the purchaser, if such is the intention of the parties, although measuring or weighing is to be had at a subsequent time, in order to ascertain the amount to be paid. *Straus et al.* v. *Minzesheimer*, 492.

SALES. DELIVERY OF GOODS SOLD. *Continued.*

6. If an entire stock of cigars is sold, the parties estimating them at a given number, for a fixed price, which is paid, and all is done that can be done to deliver possession at the factory where they are, the counting, boxing and stamping will not be necessary to pass the title as against an attaching creditor of the vendor. *Straus et al.* v. *Minzesheimer*, 492.

7. If a party purchase an entire lot of cigars of another, and the vendor, after receiving payment, takes the purchaser to the factory, and says: "Here are your cigars," handing to him several boxes, and the purchaser pays for the stamps to go upon the boxes, and employs the hands in charge of the factory to stamp them, in accordance with the laws of the United States requiring this to be done before removal, this, being as complete a delivery as the vendor can make, will be sufficient to pass the title as against an attaching creditor of the vendor. Ibid. 492.

SALE OF GRAIN FOR FUTURE DELIVERY.

8. *Whether an absolute sale, or merely a contract for a sale.* A contract between a farmer, engaged in raising corn, and a grain dealer, made whilst corn was growing in the field, whereby the farmer sold to the dealer a certain quantity of corn, at an agreed price, to be delivered when called for, the purchaser to give ten days' notice of the time he would call for it, and a part of the purchase money was paid at the time of making the contract, is an absolute sale of corn, to be delivered in the future, and not a contract for a future sale. *Sanborn et al.* v. *Benedict*, 309.

9. *Notice by the purchaser.* And in such a case, the purchaser is bound to give notice of his readiness to receive the corn within a reasonable time; and if he fails to do so, the seller may offer to deliver the corn without such notice, and the purchaser is bound to accept and pay the contract price for it. Ibid. 309.

10. *Such a sale not a gaming contract.* If a party has property under his control, he has a right to sell it, to be delivered at a future time, and it is not essential that the party making such sale should have the present possession of the property. Ibid. 309.

11. A contract, made when corn is growing in the field, for the sale of a certain amount of corn, at a stipulated price, to be delivered in the future, is not illegal, although the judgment of the parties as to the prospect of a corn crop may have controlled them, more or less, in making the contract. Ibid. 309.

12. Time contracts, made in good faith, for the future delivery of grain or other commodity, are not prohibited, either by the common law or statute. *Wolcott et al.* v. *Heath*, 433.

SALES. *Continued.*

TENDER.

13. *Of corn sold.* Where a party has sold and agreed to deliver two thousand bushels of corn, it is a sufficient tender if he has it ready to be delivered, and offers to deliver it, according to his contract, without carrying the whole amount of the corn with him when he makes the offer. *Sanborn et al.* v. *Benedict*, 309.

JUDICIAL SALES.

14. *Failure of title—caveat emptor applies.* In the absence of all fraud, a court of equity can not relieve a purchaser at a judicial sale on the ground that the title fails. The maxim *caveat emptor* applies the same in equity as at law, in respect to such sales. *Holmes* v. *Shaver*, 578.

15. *Failure of consideration.* Where land is purchased on execution, and the same is redeemed by a judgment creditor, and the purchaser at the first sale again bids off the same, and, by an agreement with the redeeming creditor, gives his notes for the amount of his bid, and receives a certificate of purchase, a court of equity will not enjoin the collection of the notes on the ground that a prior mortgagee has instituted proceedings to have both sales set aside. In such case, there is no failure of consideration. Ibid. 578.

SCHOOLS.

MECHANIC'S LIEN.

Does not lie against school property. See **LIENS, 6**

SCHOOL DIRECTORS.

OF THEIR POWER.

1. *To purchase property and contract debts.* The powers of school directors all exist under the statute, and are extremely limited. They may appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid, and the form of the orders to be drawn by them on the treasurer of the township is prescribed by statute, and must be followed; and such orders can not be made payable on time, or draw interest. *Clark et al.* v. *School Directors*, 474.

2. The authority given to school directors by statute, to "appropriate to the purchase of libraries and apparatus any surplus funds, after all necessary school expenses are paid," is a limitation of their power to make such purchases to the circumstances named, and is an implied restriction of any power to purchase generally on credit. Ibid. 474.

3. A purchase of such articles by the school directors on a credit, where it does not appear that there were any surplus funds, after all necessary school expenses were paid, applicable to such purchase, is

SCHOOL DIRECTORS. OF THEIR POWER. *Continued.*

void, and there is no contract implied by law to pay for articles thus purchased, arising from their receipt and use. *Clark et al.* v. *School Directors*, 474.

4. The only remedy of the seller, under such circumstances, is, to claim the property itself. Ibid. 474.

SCHOOL TOWNSHIPS.

ARE NOT MUNICIPAL CORPORATIONS.

1. School townships, being created and continued only for educational purposes, and not for the purpose of exercising any of the functions of government, are not municipal corporations in their nature or purpose. *The People ex rel.* v. *Trustees of Schools*, 136.

TAXATION BY SCHOOL DISTRICTS.

2. *For what purpose allowable.* See TAXATION, 11.

SCHOOL TREASURER.

LIABILITY FOR RELEASING MORTGAGE.

1. If a school treasurer releases a mortgage given to secure a debt due the school fund of his township, without an order of the board of trustees, or a majority of them, entered upon their journal, and subscribed by their president and clerk, he will be liable upon his official bond for any loss sustained in consequence thereof. *Board of Trustees* v. *Mosenheimer et al.* 22.

SCIRE FACIAS.

TO MAKE A DEFENDANT PARTY TO A JUDGMENT.

1. *Is only a summons.* See PROCESS, 3.

TO REVIVE A JUDGMENT.

2. *Process may be sent to any county.* See JURISDICTION, 1, 2.

SERVICE OF PROCESS. See PROCESS, 1, 2.

SETTLEMENT.

EVIDENCE IN RESPECT THERETO.

1. Where A and B purchased a mill and house, for which A turned in two mules, a wagon and harness, in payment for his half of the price, and then died at B's house, while the mill was being removed to B's, and at the appraisement of A's estate, B brought to the appraisers other property, and had the same appraised as A's property, agreeing that if there was any difference in favor of the estate between the property thus produced for appraisement and that which A had paid on their joint purchase, he would pay it, and if it was in

SETTLEMENT. EVIDENCE IN RESPECT THERETO. *Continued.*

his favor the estate should pay him, it was *held*, in a suit by the estate to recover the difference, that the conduct of B, in producing the property for appraisement, and statements made, might properly be considered by the jury as tending to show a settlement and promise between A and B, before A's death. *Gregory* v. *Martin, Admr.*, 38.

SLANDER.

EVIDENCE OF MALICE.

1. *Plea of justification not proven.* The fact that a party, in an action for slander, fails to establish the truth of his plea of justification, by a preponderance of proof, is not of itself conclusive evidence of malice. It is sufficient if he believed it was true. *Hawver* v. *Hawver*, 412.

2. Such a defense can only be deemed proof of malice where it appears, from the whole case, that it was made with a malicious intent, and even then it is simply proof, but not conclusive proof. Ibid. 412.

SPECIFIC PERFORMANCE. See CHANCERY, 11 to 25.

STATUTES.

REPEAL OF STATUTES.

1. *A general statute, not inconsistent with a former one, does not repeal the former.* A general statute, without negative words, will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. *Covington* v. *City of East St. Louis*, 548.

2. *Special law not repealed by general.* A general law does not operate as a repeal of a special law on the same subject, although passed at the same session. Ibid. 548.

3. *Changing boundaries of towns and cities.* The general law, in force July 1, 1872, to "provide for annexing and excluding territory to and from cities, towns and villages, and to unite cities, towns and villages," did not operate to repeal the special provisions of a charter, on the same subject, adopted prior to the new constitution. Ibid. 548. See CORPORATIONS, 8, 9.

CONSTRUCTION OF STATUTES.

4. A section of a statute will be construed with reference to the provisions of other sections relating to the same subject, and so as to leave all the words in the different sections in full effect according to their ordinary and usually accepted meaning. *Thompson* v. *Bulson*, 277.

STATUTES. CONSTRUCTION OF STATUTES. *Continued.*

5. *Proviso, how construed.* A proviso in a statute is construed as affecting the paragraph to which it is annexed only, and not to the whole section or act, unless the collocation of the words shows a different intention. *Spring et al.* v. *Collector of city of Olney*, 101.

STATUTES CONSTRUED.

6. *Regulating the business of slaughtering in the city of Chicago—upon whom the power was conferred by the act of* 1867 *creating the board of health of that city. Tugman* v. *City of Chicago*, 405. See CORPORATIONS, 7.

7. *Dram shops—the act of* 1874 *does not extend to acts of mere private hospitality. Albrecht* v. *The People*, 510. See INTOXICATING LIQUORS, 3, 4.

8. *Appeals from justices of the peace to the circuit court—when they will lie.* Construction of the statute. *Town of Partridge* v. *Snyder*, 519. See APPEALS, 1, 2.

9. *Taxation by municipal corporations.* Act of April 15, 1873, construed in *Spring et al.* v. *Collector of city of Olney*, 101. See TAXATION, 12 to 15.

10. *City courts—of their organization and jurisdiction under act of* 1874. *The People ex rel.* v. *The common council of the city of Aurora et al.* 218. See COURTS, 7.

11. *Control of police force of cities and villages—in whom vested under act of April* 10, 1872. *Sheridan et al.* v. *Colvin et al.* 237. See CHICAGO, CITY OF, 1 to 4.

12. *Want or failure of consideration—can not be pleaded by acceptor of bill of exchange.* Sec. 9, ch. 98, Rev. Stat. 1874, construed in *Nowak* v. *Excelsior Stone Co.* 307. See BILLS OF EXCHANGE, 3.

13. *Writ of error coram nobis.* Effect of the act abolishing the same. *Courson* v. *Hixon*, 339. See JUDGMENTS, 9.

14. *Wages exempt from garnishment.* The statute construed in *Bliss* v. *Smith*, 359. See GARNISHMENT, 1 to 4.

STATUTE OF FRAUDS.

UNDERTAKING TO ANSWER FOR DEBT, ETC., OF ANOTHER.

1. Where the owner of a building being erected said to a material man, who had already furnished materials to the contractor who was building the house, that he would pay for all the materials that the contractor might get for the building, it was *held*, that the owner was liable, on his promise, for all materials furnished thereafter for such building and charged to him, but he was not liable for such as had, before the promise, been furnished to the contractor. *Owen* v. *Stevens*, 462.

STATUTE OF FRAUDS.

UNDERTAKING TO ANSWER FOR DEBT, ETC., OF ANOTHER. *Continued.*

2. If the credit is alone given to the person promising to pay, the Statute of Frauds can have no application, as it only affects verbal promises for the payment of the debt, default or miscarriage of another person. *Schoenfeld* v. *Brown et al.* 487.

3. Where contractors to furnish materials and build a house enter into a contract with another to furnish a ecrtain part of the materials, and the latter, after furnishing a small part of the materials, abandons the contract on account of the insolvency of the principal contractors, and the owner of the premises verbally promises to pay for the balance, and other materials are furnished on the faith of such promise to pay, it will not be within the Statute of Frauds. Ibid. 487.

4. As respects any promise to answer for the debt, default or miscarriage of another person, the *promise* is required by the Statute of Frauds to be in writing, but the writing need not state the consideration of the promise. *Patmor* v. *Haggard et al.* 607.

CONTRACT FOR SALE OF LAND.

5. The provision of the Statute of Frauds of 1869, that a contract for the sale of land shall be in writing, requires the consideration as well as the promise itself to appear in writing. Under the revision of 1874 the rule is different. Ibid. 607.

PAROL AGREEMENT TO RE-CONVEY LAND.

6. Land was sold under a deed of trust and conveyed to the purchaser, and by such purchaser conveyed to a third party. Afterwards, the grantor filed a bill against said third party seeking to redeem, alleging that he had, before purchasing, made a verbal agreement with the grantor in the deed of trust, that he would make such purchase and convey the land to the complainant upon certain terms stated in the bill: *Held*, that such an agreement, if made, was within the Statute of Frauds and Perjuries. *Wilson* v. *McDowell*, 514.

RATIFICATION OF SALE OF LAND BY AGENT.

7. *Whether within the statute.* See RATIFICATION, 1.

PAROL CONTRACT FOR A LEASE.

8. *Not void in all cases.* A parol contract, which is required to be in writing by the Statute of Frauds, where the parties treat it as obligatory until executed, is not void; and such a contract may also be available for some purposes in equity, or in an action, in some instances, to recover on a *quantum meruit*. *Wheeler* v. *Frankenthal & Bro.* 124.

CONTRACT NOT TO BE PERFORMED WITHIN A YEAR.

9. A parol agreement, made in July, for the leasing of land, the term to commence on the first day of August following, and continue for one year thereafter, is within the first section of the Statute of Frauds, and void at law. Ibid. 124.

STATUTE OF FRAUDS. *Continued.*

PART PERFORMANCE.

10. *Available only in equity.* Part performance of a verbal contract within the Statute of Frauds has no effect, at law, to take the case out of its provisions. This can only be done in equity. *Wheeler* v. *Frankenthal & Bro.* 124.

EFFECT WHEN CONTRACT WITHIN THE STATUTE.

11. A parol contract within the provisions of the Statute of Frauds can not be made the ground of a defense, any more than of an action. Ibid. 124.

SUPERIOR COURT OF COOK COUNTY.

ONLY ONE JUDGE AT A TIME.

And the record should so show. See COURTS, 1 to 5.

SURETY.

WHETHER THE RELATION OF PRINCIPAL AND SURETY EXISTS.

1. *How ascertained—presumption.* Where several persons execute a promissory note, there will be no presumption that the first signer or any other number less than the whole, is or are principal or principals, and the others co-sureties, but the fact rests in evidence *aliunde* to determine the relation they sustain towards each other. *Paul* v. *Berry*, 158.

RELEASE OF SURETY.

2. *Extension of time to the principal.* The payment of interest on a note up to the day it is paid at a greater rate of interest than the party is legally bound to pay, without any other proof, does not show an agreement to extend the time of payment so as to release a surety. *Stearns et al.* v. *Sweet et al.* 446.

3. Where an extension of time is given a principal debtor for the payment of money, by a valid and binding agreement, without the assent of the sureties, they are thereby released. *Myers* v. *First National Bank of Fairbury*, 257.

4. *Consideration for such agreement—payment of usurious interest.* An agreement by the holder of a promissory note, made with the principal in said note, without the knowledge or consent of the sureties, to extend the time for the payment thereof, in consideration of usurious interest paid by the principal, and accepted by the holder of such note, is a valid and binding contract for an extension of time, and releases the sureties. Ibid. 257.

RATIFICATION AS PRINCIPAL.

5. Where a father executes a promissory note, and signs his son's name thereto as principal, and procures others to sign as sureties, and the son afterwards ratifies the act by suffering judgment to go against him on the note, with full knowledge that it is claimed he is principal, he can not maintain a suit against the sureties for contribution. *Paul* v. *Berry*, 158.

SURETY. *Continued.*

CONTRIBUTION.

6. Where it is established by proof that two or more persons are co-sureties, and one of them pays the debt for which they are liable, he may have contribution from the others to the extent they are thereby relieved. *Paul* v. *Berry*, 158.

7. It is also well settled, that co-sureties may, by agreement among themselves, so far sever their unity of interest and obligation, as to terminate the right of contribution. Ibid. 158.

ADMINISTRATOR AS EXECUTOR OF SOLE DISTRIBUTEE.

8. *Whether money coming to hands of administrator, who is also executor of sole distributee, is held as executor or administrator.* See ADMINISTRATION OF ESTATES, 1, 2.

SURETIES ON OFFICIAL BONDS.

9. *Upon which of two bonds liable in case the officer is re-elected.* See OFFICIAL BONDS, 3, 4.

SURETY IN INJUNCTION BOND.

Character and extent of his undertakings. See INJUNCTIONS, 10, 11.

SWAMP AND OVERFLOWED LANDS.

WHAT CONSTITUTES SWAMP LANDS.

1. It is not necessary, to constitute swamp and overflowed land, within the meaning of the act of Congress, that it should be overflowed annually. It is sufficient if it is subject to overflow, requiring artificial means to subject it to beneficial use. *Keller* v. *Brickey*, 133.

OF THE TITLE IN THE STATE.

2. *Under the act of Congress* of September 28, 1850, the title to the swamp and overflowed lands of the United States within this State, unsold, was vested *ipso facto* in the State of Illinois, and a patent for a tract of such land, made by the United States after the passage of that act, passes no title. Ibid. 133.

TAXATION.

LEGALITY OF ASSESSMENT—PRESUMPTION.

1. It will be presumed that taxes are properly and legally assessed, and are legally and justly due, in the absence of proof to the contrary. The collector's list and report of delinquent lands in the manner prescribed by statute, entitles him to judgment, unless the taxpayer satisfactorily shows that the taxes have been paid, or some other legal defense going to the merits. *Buck* v. *The People ex rel. Swigert*, 560.

DESCRIPTION OF LANDS FOR TAXATION.

2. The statute expressly authorizes the use of abbreviations in assessing property for taxation, and any description of property for

TAXATION. DESCRIPTION OF LANDS FOR TAXATION. *Continued.*

the purposes of taxation, by which a qualified surveyor can locate and find the land, will be sufficient. *Buck* v. *The People ex rel. Swigert*, 560.

3. The description of property for taxation, as lot 4, and blocks 86, 87, etc., in a party's addition to a city, is sufficient. So a description, as the east end of blocks 99 and 100, will be good, and understood as the east half thereof. *Chiniquy* v. *The People ex rel. Swigert*, 570.

4. *Variance as to description in list and judgment.* If the collector's return of delinquent lands describes a person's property as the east end of lots 99 and 100, and the judgment is against the undivided third of the east end of those lots, there will be no variance, as it will be presumed the taxes were shown to have been paid before judgment on the other undivided two-thirds. Ibid. 570.

EXTENDING STATE TAXES.

5. *No order of county board necessary.* No order or resolution of the county board is necessary to authorize the county clerk in levying and extending State taxes. It is his duty to do so under the statute. Ibid. 570.

COUNTY TAX—RATE OF LEVY.

6. Section 8 of article 9 of the new constitution, which prohibits any county from levying a tax exceeding seventy-five cents on the one hundred dollars' valuation, etc., does not apply to a tax levied to pay interest on bonds given in aid of a railway, voted before the adoption of that instrument, although the subscription and the issue of the bonds occurred after its adoption. Ibid. 570.

ORDER OF LEVY OF COUNTY TAX.

7. *Construction.* Where the finance committee of a board of supervisors reported that it would require a levy of three mills on the dollar for county purposes, and that it would require a levy of a like per cent to pay interest on railroad bonds, and the board ordered a sufficient sum to be levied to pay the interest on the bonds and the three mills on the dollar for county purposes: *Held*, that the order of the board, taken in connection with the report, meant a levy of three mills on the dollar to pay interest on the county railroad bonds. *Buck* v. *The People ex rel. Swigert*, 560.

COUNTY EQUALIZATION.

8. Where the board of supervisors, in equalizing the assessment of the township assessors, raised the aggregate valuation of all the towns a trifle over one-fourth of one per cent on the entire assessment: *Held*, that, as this might have been necessary and incidental to a proper equalization, it did not invalidate the taxes levied on such equalized valuation. Ibid. 560.

TAXATION. *Continued.*

TAXATION FOR CORPORATE PURPOSES.

9. *Constitutional limitation.* The provision in the constitution of 1848, that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be invested with power to assess and collect taxes for corporate purposes," was intended to limit the legislative power in conferring authority on corporate bodies to assess and collect taxes. ***The People ex rel.* v. *Trustees of Schools*, 136.**

10. *What is a corporate purpose.* A corporate purpose, within the meaning of the constitution authorizing taxation for the same, is a purpose necessary or proper to carry into effect the object of the creation of the corporate body. Ibid. 136.

11. *Taxation by school districts.* A tax by a school township or district to aid in the construction of a railroad, or to pay interest on bonds issued in aid of such road, is not for a corporate purpose, and such power can not, constitutionally, be conferred on such bodies. It seems that such a power can be conferred only upon purely municipal corporations. Ibid. 136.

12. *Municipal taxation under acts of* 1872 *and* 1873. The act of April 15, 1873, authorizing incorporated cities to levy taxes annually, not exceeding three per cent, applies as well to cities incorporated under special charters as to those incorporated under the general act of 1872. *Spring et al.* v. *Collector of Olney*, 101.

13. The act of April 15, 1873, relating to taxation by cities, is not an act amendatory of the general act of 1872 for the incorporation of cities and villages, but is an independent act, applicable to all incorporated cities, whether under the general law or under special charters. Ibid. 101.

14. The proviso to the fifth clause of the first section of the act of April 15, 1873, that "no tax shall be levied under this *section* unless two-thirds of all the aldermen elected shall vote in favor of the same," does not apply to the whole section, but only to the tax mentioned in such clause. Ibid. 101.

15. The power to levy taxes by a city "for general and contingent expenses, or any other expenses not herein otherwise provided for," is sufficiently broad to authorize the levy of a tax thereunder to pay ordinary debts. Ibid. 101.

CERTIFICATE OF MUNICIPAL TAXES.

16. *Effect of not filing in time.* If the certificate of the amount of municipal taxes is not filed with the county clerk within the time required by statute, this will not invalidate the levy, as the irregularity or defect is cured by section 191 of the Revenue law of 1874. *Chiniquy* v. *The People ex rel. Swigert*, 570; *Buck* v. *The People ex rel. Swigert*, 560.

TAXATION. CERTIFICATE OF MUNICIPAL TAXES. *Continued.*

17. *By whom certificate made.* So, if the persons making such certificate fail to describe themselves as officers, with precise accuracy, or do not use the full name of their corporate bodies, this statute will cure the defects. The case of *Mix* v. *The People*, June T. 1874, was decided under a different statute. *Buck* v. *The People ex rel. Swigert*, 560.

APPLICATION FOR JUDGMENT.

18. *Collector's notice of application for judgment as to back taxes.* If the collector's notice of application for judgment for taxes contains a note at the head of the published list, that the prefix of the letter "*a*" indicates a back tax for the preceding year, and the letter "*b*" for the two preceding years, and these letters are so used when there are back taxes, this will be a sufficient compliance with the statute. *Chiniquy* v. *The People ex rel. Swigert*, 570.

19. *Proof of notice of applying for judgment.* An affidavit of a printer of a newspaper of the publication of the delinquent list and notice of applying for judgment, properly sworn to, which states the day when the publication was made, and the paper in which the list and notice were inserted, will be sufficient proof of publication to confer jurisdiction on the court to render judgment. *Buck* v. *The People ex rel. Swigert*, 560.

20. *Time of making affidavit by collector, etc.* The failure or neglect of the collector and county clerk to compare and correct the list of delinquent taxes, and of the collector to file an affidavit that the list is correct, on the first day of the term at which application for judgment is made, not affecting the substantial justice of the tax, furnishes no ground for withholding judgment. The omission is supplied if the affidavit is filed after the first day of the term. *Chiniquy* v. *The People ex rel. Swigert*, 570.

21. *Collector's return is prima facie evidence of the facts necessary to render judgment.* The collector's return of delinquent lands to the county court is sufficient evidence of the assessment, the levy of the tax, and that it is unpaid, to authorize judgment, unless the tax-payer shall show that it is substantially unjust to render the same. Ibid. 570.

22. *Grounds of defense—former decisions modified by statute.* Under section 191 of the Revenue law of 1874, unless there are shown in defense matters which affect the "substantial justice of the tax itself," its collection will be enforced. That section has overruled or modified most, if not all, the prior decisions of this court in regard to proceedings for the collection of the revenue. Ibid. 570.

23. *No defense that the taxes are high.* It is no defense to an application for judgment against delinquent lands, that the taxes are high,

TAXATION. APPLICATION FOR JUDGMENT. *Continued.*

where there is no unfairness or injustice in the assessment, and there is no inequality in the taxes imposed. *Buck* v. *The People ex rel. Swigert*, 560.

24. *Party objecting to judgment can not complain of irregularities as to others.* A party objecting to judgment against his lands will not be allowed to urge objections as to other tax-payers not complaining, but will be confined to such as apply to his own property. *Chiniquy* v. *The People ex rel. Swigert*, 570.

25. A misdescription or defective description of a tract of land by an assessor, will not affect the taxes imposed on other tracts, and the law will not allow a party resisting judgment against his property for taxes, to raise an objection which does not apply to his property, but does to that of others, who do not object. *Buck* v. *The People ex rel. Swigert*, 560.

26. *Objections to judgment must be signed.* Objections to the rendition of judgment against lands for taxes, being in the nature of a pleading, must be signed either by the party or by his attorney, or the court will be warranted in disregarding them. Ibid. 560.

27. *Legality of tax, how questioned.* If a party intends to urge in this court that a portion of the State and school taxes levied are unconstitutional and void, he must make the specific objection in the court below, and preserve the evidence of the facts in the record. *Chiniquy* v. *The People ex rel. Swigert*, 570.

COLLECTOR'S REPORT.

28. *Use of initials or abbreviations.* There is no objection to the use of initials or abbreviations in the collector's report, to indicate the kind of tax, at the head of each column. Ibid. 570.

COLLECTOR'S WARRANT.

29. *As a protection to officer levying.* See TRESPASS, 3.

TENDER.

PLEA OF TENDER.

1. *Admits the amount named therein to be due.* Where a defendant pleads a tender of a certain amount to the plaintiff, he thereby admits that that amount is due, and he is estopped from denying it. *Monroe* v. *Chaldick*, 429.

SIGNING JUDGMENT.

2. *On plea of tender.* And the plaintiff has the right to sign judgment on a plea of tender, to the amount alleged to have been tendered, if it has not been paid into court. Ibid. 429.

3. *Practice in case of signing judgment.* The correct practice, where a plaintiff elects to take the amount alleged to have been tendered, is, if the money is brought into court, to order it to be paid

TENDER. SIGNING JUDGMENT. *Continued.*

over to the plaintiff, and render judgment against him for costs; but if the money is not brought into court, the judgment should be against the defendant for the amount of the tender, and costs. *Monroe* v. *Chaldick*, 429.

OF A MERE OFFER TO PAY.

4. *Effect on right of recovery.* See CONTRACTS, 22.

SALE OF GRAIN FOR FUTURE DELIVERY.

5. *What is a sufficient tender of the grain.* See SALES, 18.

TERMS OF COURT.

DECREE AT TERM NOT AUTHORIZED.

1. *Void.* Where a term of the circuit court is held in March, in ignorance of the fact that the legislature had changed such term to the April following, all the judgments and proceedings had will be without warrant of law and void. *Robinson* v. *Ferguson et al.* 538.

2. *Subsequent re-entry of decree at regular term.* But where a decree was rendered for the specific performance of a contract for the sale of land, at such a term of court, requiring the complainant to make payment of the price due, which he did before the next regular term, and the court, at the latter term, found that fact, and again decreed a conveyance to be made, under which the master executed a deed: *Held*, that the last decree was sufficient to uphold the deed and pass the title. Ibid. 538.

REGARDED AS ONE DAY.

3. It is a familiar rule of law, that a term of court, for most purposes, is considered as but one day. *Chiniquy* v. *The People ex rel. Swigert*, 570.

TOWNSHIP COLLECTOR.

OF HIS OFFICIAL BOND. See OFFICIAL BONDS, 1, 2.

TRANSCRIPT FROM JUSTICE'S DOCKET.

CAN NOT BE FILED AFTER DEATH OF DEBTOR.

1. The filing of the transcript of a judgment recovered before a justice of the peace, in the circuit court, after the death of the defendant, and the issue of an execution thereon, confers no right on the creditor to levy upon and sell lands of the deceased defendant, or to redeem from a prior sale as a judgment creditor; and a sale of land in either case will be void, and may be attacked collaterally. *Clingman et al.* v. *Hopkie*, 152.

LOSS OF SUCH TRANSCRIPT.

2. *In what manner supplied.* See CHANCERY, 8.

TRESPASS.

TRESPASS AGAINST AN OFFICER.

1. *For wrongfully issuing attachment.* If a justice of the peace issues an attachment when not authorized to do so, his ignorance as to the extent of his authority is no excuse. *Thomas* v. *Hinsdale et al.* 259.

2. A party went before a justice of the peace, on Sunday, and made an affidavit, upon which the justice issued an attachment, and appointed another party to execute it, who took the writ, and, under it, seized and carried away the goods of the defendant in the attachment. The defendant appeared before the justice, and procured a change of venue to another justice, but did not defend the attachment suit any further, but brought an action of trespass against the plaintiff in the attachment suit, the justice who issued it, and the appointed constable who served it: *Held*, that they were all liable, and that the right to bring the action of trespass was not waived by appearing and taking the change of venue in the attachment suit. Ibid. 259.

3. *Process as justification.* If a collector should be sued in trespass for levying upon property for taxes, the warrant, without any other evidence, will show a complete justification, and it will be evidence that all the legal steps have been taken to assess, levy and extend the taxes, and this, though he has been compelled to return his warrant unsatisfied. *Chiniquy* v. *The People ex rel. Swigert*, 570.

TROVER.

WHAT AMOUNTS TO A CONVERSION.

1. It is not necessary, to render one liable in trespass or trover, that there should be an appropriation of the thing to the party's own use or beneficial enjoyment. The disposing, or assuming to dispose, of another man's goods, without his authority, is a conversion of them. *Mead* v. *Thompson*, 62.

2. Where a creditor of a tenant attached the crops of the latter, upon which the landlord had a lien for rent, and, after the levy of a distress warrant, purchased the same at the sale under his attachment, and transferred his bid to a third person, who took and disposed of the crops: *Held*, that the creditor, by bidding off the property and transferring his bid, assumed such control over the property as amounted to a conversion, and rendered him equally liable with his assignee to the landlord for the amount of his lien for rent. Ibid. 62.

USURY.

PENALTY TO SECURE PROMPT PAYMENT.

1. *Not usurious.* A provision in a promissory note for the payment of thirty per cent interest per annum after maturity, as liqui-

USURY. PENALTY TO SECURE PROMPT PAYMENT. *Continued.*

dated damages for non-payment when due, if inserted for the purpose of securing prompt payment, does not render the transaction usurious. *Downey, Admr.* v. *Beach*, 53.

VENDOR AND PURCHASER.

SPECIFIC PERFORMANCE.

1. *Whether it will be granted.* See **CHANCERY, 11 to 25**

TIME OF PAYMENT.

2. *Waiver thereof.* See CONTRACTS, 10.

VENUE.

CHANGE OF VENUE.

1. *At what stage of a suit it may be had.* A party can not wait until a cause is on trial, and until the court has intimated an opinion on the merits of the case, from the evidence, and then obtain a change of venue. *Richards* v. *Greene*, 525.

VERDICT.

PUTTING VERDICT IN FORM.

1. Where the verdict of a jury is not in form, mere irregularity in the proceedings of the court in having the same put in form, as in oral remarks and instructions which could not have affected the finding of the jury, except as to the mere form of the verdict, will not be sufficient error to reverse. *Brown* v. *Rounsavell*, 589.

WAIVER.

AS TO TIME OF PAYMENT.

1. *As between vendor and purchaser of land.* See CONTRACTS, 10.

WRONGFULLY SUING OUT ATTACHMENT.

2. *Waiver of the trespass by appearance in the attachment suit.* See TRESPASS, 2.

MUNICIPAL SUBSCRIPTION AND BONDS.

3. *Waiver of conditions.* See **MUNICIPAL SUBSCRIPTION AND BONDS, 1.**

WARRANTY.

WHAT CONSTITUTES.

1. *Statement in bill rendered.* The mere description of iron sold, as mill iron, in a bill rendered to the purchaser, will not amount to a warranty that the same is of the quality or grade described, but will be regarded as a mere statement or expression of opinion as to the quality. *Carondelet Iron Works* v. *Moore et al.* 65.

WARRANTY. WHAT CONSTITUTES. *Continued.*

2. *Words used must show an intent to warrant.* While no particular form of words is required to make a warranty, and it is not necessary that the word warrant be used, still it is necessary that such expressions should be used as to show the intention of the party to bind himself to make good the quality of the articles as described or represented, and not a mere statement or expression of opinion as to the quality. *Carondelet Iron Works* v. *Moore et al.* 65.

WHARFINGERS.

DUTY TO SHIP GOODS AS DIRECTED.

1. *Liability for not obeying instructions as to whom goods are to be shipped.* Where grain was delivered to wharfingers, to be shipped to a certain party in New Orleans, where certain rates could be had, and, before shipment, they were notified not to ship to such party, but to another, which they neglected to do, but shipped according to the first direction, and the price of the grain was lost, in consequence of the insolvency of the consignee, it was *held*, that the wharfingers were liable to the shipper for its value. *Howell et al.* v. *Morlan*, 162.

WIDOW.

OF HER RIGHTS AS TO PERSONAL PROPERTY.

1. *Where it has been disposed of by her husband in his lifetime.* Any disposition of personal property and credits by a husband, in good faith, where no right or interest is reserved to him, either present or ultimate, though made to defeat the rights of his wife, will be good against her. *Padfield* v. *Padfield et al.* 16.

2. Where a husband transferred to one of his sons notes and evidences of indebtedness to the amount of $60,000, under an agreement that he was to have one-third, and at the donor's death the son should deliver the balance to certain trustees for the donor's other two children, in consideration of which the son was to pay his father $2000 annually, while he lived, for support: *Held*, that the transfer was based upon a sufficient consideration, and placed the property beyond the father's reach, and that his widow could not claim any dower in the same. Ibid. 16.

3. If the husband had retained the right to control the property and resume the same at pleasure, the gift would have been in fraud of the rights of his wife, and, on his death, she could have recovered her share in the same, as given by the statute. Ibid. 16.

4. There is nothing in the statute respecting estates of deceased persons, that in the slightest degree prevents a husband from disposing of his personal property free from any claim of his wife, whether by sale, gift to his children, or otherwise, in his lifetime. Ibid. 16.

WILLS.

PROBATE OF WILL.

1. The statute has prescribed what is necessary to admit a will to probate, and courts have no power to superadd other conditions or dispense with any portion of those enumerated in the statute; nor has the court the slightest discretion. When a case is made, the court must admit the will to probate, and if the necessary proof is not produced, the court must reject the will. *Doran* v. *Mullen*, 342.

2. Where one of the witnesses testified that he saw the testator sign the will, and that he signed it at the request of the testator; and the other, that the testator's name was signed to it at the time he witnessed it, and both witnesses testified that they signed it and witnessed it in the presence of the testator and of each other, and that the testator was of sound mind and memory when they witnessed the instrument, and that he was at that time from forty-five to fifty years of age, the requirements of the statute were fully complied with, and the court had no power to reject the will. Ibid. 342.

3. The fact that a will bears date on the 20th day of the month, and the petition of the proponent of the will for letters of administration states that the testator died on the 17th of the same month, does not tend to prove that the will is a forgery. The more reasonable supposition is, that the proponent was mistaken as to the date of the death, or that a mistake was made in the date of the will. Ibid. 342.

GENERAL RULES OF CONSTRUCTION.

4. In the construction of wills or other instruments, in cases of doubt all the parts should be considered together, and, if possible, effect should be given to every clause and provision according to the intention of the maker. *Brownfield* v. *Wilson et al.* 467.

5. Technical rules are not so rigidly applied in the construction of wills, which are frequently written by persons unskilled and imperfectly acquainted with the accurate meaning of language, as in the construction of deeds; but the question, however, is, the entire instrument being considered, what did the testator intend by the will. Ibid. 467.

6. A latter clause of a will is to be considered, when repugnant to a former provision, as intending to modify or abrogate the former. Ibid. 467.

7. Whilst courts, in cases of doubt, may resort to surrounding circumstances to afford light in which to read the will and ascertain the intention of the testator, still they should never control—they are intended as mere aids. Ibid. 467.

WILLS. *Continued.*

DECLARATIONS OF TESTATOR.

8. In construing wills, courts can not resort to the declarations of the testator, either before or after the execution of the will, to control its provisions. *Brownfield* v. *Wilson et al.* 467.*

WHETHER A FEE OR ONLY AN ESTATE FOR LIFE.

9. By one clause of his will a testator gave to his wife a certain tract of land, and by a subsequent clause he gave to his children, to share equally and alike in his real estate—the real estate to be sold after his wife's death: *Held*, that the wife took a fee simple estate, and not merely an estate for life. *Brownfield* v. *Wilson et al.* 467.

NUNCUPATIVE WILLS.

10. *Strict construction of statute.* The provisions of a statute in regard to nuncupative wills must have a rigid and strict construction, and must be strictly enforced by courts. *Morgan et al.* v. *Stevens*, 287.

11. *Requirements of the statute.* The testamentary capacity and the intention to make a will at the time of the alleged nuncupation must appear by the clearest and most indisputable testimony; and it must further appear that the proof embodies the real testamentary intention of the deceased, in order to establish a nuncupative will Ibid. 287.

12. It is essential to the establishing of a nuncupative will under the statute, that it shall be made in the last sickness of the testator, and that it shall be proved by two or more credible witnesses, who were present at the speaking and publishing thereof, who shall state, on oath, that they were present and heard the testator pronounce the words, and that they believe him to have been of sound mind and memory; and that he did, at the time, desire the persons present, or some of them, to bear witness that such was his will. And at least two witnesses must concur as to all these facts. Ibid. 287.

13. Where there were but two witnesses present at the time of the alleged speaking and publishing of a nuncupative will, and they both testified to all the facts required by the statute except the fact as to their being requested by the testatrix to bear witness that the words spoken were her will, upon which fact they differed, one saying that such request was made, and the other that it was not: *Held*, that the requirements of the statute were not fulfilled, and the will was not established. Ibid. 287.

14. Where the proof showed that the testatrix, during her last sickness, said that she wanted her husband to have her property, and at the same time said that she wanted another person to have some-

*See, also *Rutherford et ux.* v. *Morris et al.* 77 Ill. 397.

WILLS. NUNCUPATIVE WILLS. *Continued.*

thing, and that she would finish or fix it to-morrow, and she lived six days afterwards, and was all the time in a condition to make a will in writing, the words so spoken under such circumstances do not amount to such a declaration as should be admitted to probate as a nuncupative will. *Morgan et al.* v. *Stevens*, 287.

WITNESSES.

COMPETENCY.

1. *Husband and wife, when competent for and against each other.* The wife of a defendant is not a competent witness for him, in an action for slanderous words spoken by him of the plaintiff. *Hawver* v. *Hawver*, 412.

2. The husband of a plaintiff, in an action for slanderous words spoken of her, is a competent witness on her behalf. Ibid. 412.

3. *Of wife for her husband.* The fact that a party's wife was present when he purchased goods, and selected them, with the assistance of her husband, does not make her the agent of the latter, and in a suit against him for the price, the wife is not a competent witness in his behalf, to prove that the goods were furnished on the credit of a third person, in payment of a debt of such third person to the husband. *Trepp* v. *Barker*, 146.

4. *Widow a competent witness to protect her separate property.* Where the litigation involves the separate property of the wife, she is made a competent witness to protect the same, and the fact that her husband is dead, will not render her incompetent as a witness against his administrator, when her property is replevied in a suit by a party claiming under her, against the administrator of her husband's estate. *Primmer* v. *Clabaugh*, 94.

CREDIBILITY.

5. *Jury to decide.* The weight to be given to the testimony of a witness is for the jury to determine, and this court will not reverse or supervise their finding on such a question. *Paton et al.* v. *Stewart*, 481.

TABLE OF UNREPORTED CASES.

JUNE TERM, 1873.

ST. LOUIS, ALTON AND TERRE HAUTE RAILROAD CO. *v.* BRADSHAW. APPEAL from the Circuit Court of Perry county. Opinion by SHELDON, J. *Judgment reversed.*

Mr. *W. K. Murphy*, for the appellant.

Mr. *S. G. Parks*, and Mr. *T. T. Fountain*, for the appellee.

WICKERSHAM *et al. v.* WICKERSHAM. WRIT OF ERROR to the Circuit Court of Marion county. Opinion by BREESE, C. J.

Decree reversed.

Mr. *W. W. Willard*, and Mr. *M. Schæffer*, for the plaintiffs in error.
Mr. *Henry C. Goodnow*, for the defendant in error.

JUNE TERM, 1875.

BERNS *v.* ASKINS. APPEAL from the Circuit Court of St. Clair county. Opinion by SCHOLFIELD, J.

Judgment affirmed.

Messrs. *C. W. & E. L. Thomas*, for the appellant.
Mr. *James M. Dill*, for the appellee.

DOWTY *v.* THOMAS *et al.* APPEAL from the Circuit Court of Effingham county. Opinion Per CURIAM.

Judgment affirmed.

Mr. *R. C. Harrah*, for the appellant.
Messrs. *Gilmore & White*, for the appellees.

GALLATIN NATIONAL BANK OF SHAWNEETOWN *v.* COOK *et al.* APPEAL from the Circuit Court of Gallatin county. Opinion Per CURIAM.

Decree reversed.

Mr. *R. W. Townshend*, for the appellant.

SCHMIDT *v.* SCHMIDT. WRIT OF ERROR to the Circuit Court of St. Clair county. Opinion by SCHOLFIELD, J.

Decree affirmed.

Mr. *Wm. Winkelman*, for the plaintiff in error.
Mr. *James M. Dill*, for the defendant in error.

VARNELL *v.* SEIMER. APPEAL from the Circuit Court of Jefferson county. Opinion by SCHOLFIELD, J.

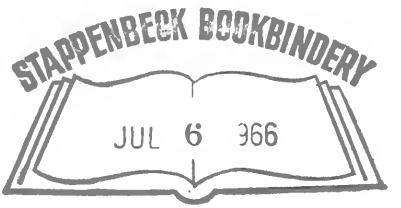
Judgment reversed.

Mr. *C. H. Patton*, for the appellant.
Messrs. *Green & Carpenter*, for the appellee.

YOST, BIGELOW & Co. *v.* BECKMAN. APPEAL from the Circuit Court of Massac county. Opinion Per CURIAM.

Judgment reversed

Mr. *John R. Thomas*, for the appellants.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